

1 UNITED STATES DISTRICT COURT  
2 MIDDLE DISTRICT OF TENNESSEE  
3 NASHVILLE DIVISION

4 CAROL BARTON

5 vs

6 THE METROPOLITAN GOVERNMENT  
7 OF NASHVILLE AND DAVIDSON  
8 COUNTY, TENNESSEE

Case No. 3:20-cv-00118

9  
10 BEFORE THE HONORABLE

11 WILLIAM L. CAMPBELL, JR., DISTRICT JUDGE

12 TRANSCRIPT OF PROCEEDINGS

13 November 9, 2022

14 Volume 2  
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1           The above-styled cause came to be heard on  
2 November 9, 2022, at 9:00 a.m., before the Honorable William  
3 L. Campbell, Jr., District Judge, when the following  
4 proceedings were had, to-wit:

5  
6           THE COURT: All right, good morning. Welcome  
7 back. Are we ready with our next witness?

8           MS. WALTER: Your Honor, we were going to go ahead  
9 and read in the fact stipulations beforehand if that was  
10 okay.

11           THE COURT: Sure. It's your horse to sell, so you  
12 just read them in when you want to. But we do have a witness  
13 ready?

14           MS. WALTER: Yes.

15           THE COURT: We're ready to get our jury back in?

16           MS. WALTER: Yes, Your Honor.

17           MS. COLLINS: We have all the witnesses ready.

18           THE COURT: Regardless of height. Okay.

19           (The jury returned to the courtroom at 9:04 a.m.)

20           THE COURT: Be seated, please. All right, members  
21 of the jury, welcome back. Hope everyone had a good evening  
22 and didn't have too much trouble getting back to us this  
23 morning with the traffic.

24           I understand you intend to read some stipulations?

25           MS. WALTER: Yes, Your Honor.

1           THE COURT: The attorney for the plaintiff is  
2 going to read some stipulations to you. These are facts that  
3 the parties agree on. So there's no dispute about them, so  
4 you can accept them as having been established for purposes  
5 of this trial and for your deliberations.

6           Go ahead.

7           MS. WALTER: All right.

8           Firstly, Carol Barton began her employment with  
9 Metro in 2003 as a part-time employee and started as a  
10 full-time employee in 2006.

11           Second, Carol Barton's final day of employment in  
12 the Employee Resource Center was June 20, 2018.

13           Christy Overstreet's first day of employment  
14 within the Employee Resource Center was July 13, 2018.

15           And then the parties have stipulated to  
16 Dr. Charles Baum's qualifications as an economic expert.

17           Your Honor, I'd like to move the parties' fact  
18 stipulations into evidence as Exhibit 25.

19           THE COURT: 25.

20           MR. FOX: No objection.

21           THE COURT: Without objection, Plaintiff's  
22 Exhibit 25 is admitted.

23           (Plaintiff's Exhibit 25 received in evidence.)

24           THE COURT: Okay, your next witness.

25           MS. WALTER: The plaintiff would like to call

1 Dr. Charles Baum.

2 COURTROOM DEPUTY: Raise your right hand, please.

3 DR. CHARLES BAUM,

4 called as a witness, having been duly sworn, was examined and  
5 testified as follows:

6 THE WITNESS: I do.

7 COURTROOM DEPUTY: State your full name for the  
8 record, please, and spell your last.

9 THE WITNESS: Charles Louis Baum II, B-A-U-M.

10 DIRECT EXAMINATION

11 BY MS. WALTER:

12 Q. All right, Dr. Baum, I'm going to read a brief statement  
13 and then ask you to let me know if I've missed anything.

14 Dr. Charles Baum is a professor of economics and  
15 finance at Middle Tennessee State University with a Ph.D. in  
16 economics from the University of North Carolina, Chapel Hill,  
17 and a Bachelor's degree in political science and economics  
18 from Wake Forest.

19 Is that all correct?

20 A. Yes.

21 Q. All right.

22 MS. WALTER: Your Honor, the parties have  
23 stipulated to Dr. Baum's qualifications as an expert witness,  
24 and I'd like to move for his testimony to be designated as  
25 expert opinion in employee economic damages.



1 THE COURT: Okay. He will be so designated.

2 BY MS. WALTER:

3 Q. All right, Dr. Baum, if you can turn to what is marked  
4 as Exhibit 24 in the plaintiff's binder, which is the larger  
5 binder.

6 A. Okay, Exhibit 24?

7 Q. Yes.

8 A. Okay. Oh, okay, there is one tab at the back.

9 Q. It's hidden at the back.

10 A. Okay.

11 Q. All right. Do you recognize this as a summary of the  
12 report you created?

13 A. Yes.

14 Q. Okay.

15 MS. WALTER: Your Honor, I'd like to move for  
16 Exhibit 24 to be moved into evidence.

17 MR. FOX: No objection.

18 THE COURT: Okay. So you're admitting the summary  
19 that he's going to read into evidence?

20 MS. WALTER: Yes, Your Honor.

21 THE COURT: Okay. But he's going to read it also?

22 MS. WALTER: Yes, Your Honor.

23 THE COURT: Okay. No objection, then Exhibit 24  
24 is admitted.

25 (Plaintiff's Exhibit 24 received in evidence.)

1 BY MS. WALTER:

2 Q. All right, Dr. Baum, if you could read the summary that  
3 is in Exhibit 24, please.

4 A. Okay. (As read): I am Charles L. Baum II, Ph.D.,  
5 professor of economics and finance at Middle Tennessee State  
6 University. I have a Ph.D. in economics from the University  
7 of North Carolina at Chapel Hill and a B.A. in political  
8 science and economics from Wake Forest University. My  
9 curriculum vitae is provided as Exhibit 22, on pages 14  
10 through 34.

11 I prepared a report of economic damages in this  
12 matter. In this report, I provide an analysis of the  
13 economic losses from lost earnings and lost employment  
14 benefits for Carol Barton from Ms. Barton's demotion on or  
15 around June 27, 2018, by the Metropolitan Government of  
16 Nashville and Davidson County, Tennessee, Metro.

17 According to documents I have reviewed,  
18 Ms. Barton's most recent salary at MNPS as a human resources  
19 information systems specialist was \$46,130.24 per year, for  
20 the 2017-2018 academic year, from \$22.17 per hour with  
21 employment benefits valued at 19.99 percent of earnings.

22 According to the documents I have reviewed,  
23 Ms. Barton's salary at MNPS as a substitute teacher is  
24 \$23,400 per year, for the 2018-2019 academic year, from  
25 working 1,950 annual hours at \$12 per hour.

1           According to documents I have reviewed, Ms. Barton  
2 earned from MNPS \$38,946.98 in 2018, \$9,306 in 2019, \$1,908  
3 in 2020, \$1,153.46 in 2021, and \$2,085 in 2022 through June  
4 the 10th of 2022.

5           According to documents I have reviewed, Ms. Barton  
6 earned \$633 from A-Z DME in 2021.

7           In this analysis, based on these assumptions, I  
8 calculate the economic losses to Ms. Barton in the form of  
9 lost earnings and lost employment benefits due to being  
10 demoted to substitute teacher by MNPS on or around June 27th  
11 of 2019.

12           The present value of the economic losses to  
13 Ms. Barton due to being demoted by MNPS is calculated to  
14 range from \$234,087 to \$378,921. This economic loss  
15 projection of the difference -- is a projection of the  
16 difference in Ms. Barton's projected earnings and employment  
17 benefits as a human resources information systems specialist  
18 with MNPS and her actual and projected earnings and  
19 employment benefits from being a substitute teacher with MNPS  
20 after her demotion.

21           In a first scenario, shown in Table 1, the present  
22 value of the economic losses from Ms. Barton's demotion by  
23 Metro are estimated to be \$234,087 after I subtract  
24 Ms. Barton's estimated potential earnings as a substitute  
25 teacher for Metro. This accounts for \$126,707 in back pay

1 and \$107,380 in front pay. I do not include  
2 nongovernment-mandated employment benefits because Ms. Barton  
3 is assumed to be employed on a part-time basis and is not  
4 eligible for insurance and retirement benefits.

5 In a second scenario, shown in Table 2, the  
6 present value of the economic losses from Ms. Barton's  
7 demotion by Metro are estimated to be \$378,921 after I  
8 subtract Ms. Barton's actual earnings as a substitute teacher  
9 for Metro. This accounts for \$200,258 in back pay and  
10 \$178,663 in front pay. Otherwise, I make the same  
11 assumptions and use the same methodology and rates as in my  
12 first scenario.

13 In the third and fourth scenarios, shown in  
14 Tables 3 and 4, I reflect the values of Table 1 and Table 2  
15 excluding the projected value of insurance benefits. And the  
16 economic losses in these two tables are \$221,716 and  
17 \$366,550, respectively. The \$221,716 value accounts for  
18 \$119,612 in back pay and \$102,104 in front pay. The \$366,550  
19 value accounts for \$193,163 in back pay and \$173,387 in front  
20 pay. Otherwise, I make the same assumptions and use the same  
21 methodology and rates as in my first scenario.

22 Q. Okay, thank you. That's a lot of information. So if  
23 you could turn to Exhibit 20.

24 A. Yes.

25 Q. Do you recognize that document?

1 A. Yes, this is my full report.

2 Q. Okay.

3 MS. WALTER: For the record, I just wanted to note  
4 that in the summary where it states that it's Exhibit 22,  
5 that is a typographical error. It's Exhibit 20.

6 And, Your Honor, I'd like to move to enter  
7 Exhibit 20 into evidence.

8 MR. FOX: No objection.

9 THE COURT: Without objection, Plaintiff's  
10 Exhibit 20 is admitted.

11 (Plaintiff's Exhibit 20 received in evidence.)

12 BY MS. WALTER:

13 Q. All right. Dr. Baum, if you could turn to page 12 of  
14 your report, please.

15 A. Okay.

16 Q. I'm going to show it on the screen here. Okay, what is  
17 this page of your report?

18 A. This is a page that describes what each column contains  
19 in my reports tables. My report has four tables, and there  
20 are columns in those tables. And each of these numbered  
21 points says what's in the columns in the tables.

22 Q. Okay. And if you could turn to page 8, please. Is this  
23 Table 1 that you referred to earlier in your summary?

24 A. Yes.

25 Q. Okay. Could you walk me through what these columns mean

1 and how you came to your analysis?

2 A. Yes. Table 1 corresponds to Scenario 1, and I've got  
3 four scenarios. Each of the rows in the table corresponds to  
4 a year. This spans from 2018 through 2027. The period that  
5 goes through 2027 is Ms. Barton's projected work life, the  
6 length of time that, as an economist, I project she would  
7 have worked. So the rows each correspond to a year. You'll  
8 actually notice that 2022 is actually on two rows. Part of  
9 it is in the past, about 11 months of it is in the past, and  
10 about one month of it is in the future. That's necessary  
11 because the Court would want me to discount future values to  
12 present value, and so it's important to separate between past  
13 values and future values.

14 Now, going through the columns, column No. 1 shows  
15 the year. And maybe I should say that my intent here is to  
16 calculate the difference in the value of what Ms. Barton  
17 would have earned at Metro as a human resources information  
18 specialist and what she earns from Metro as a substitute  
19 teacher. So I'm interested in calculating the difference in  
20 her employment earnings and benefits.

21 Column No. 2 shows the growth rate where I project  
22 over time these dollar amounts go up. We're all familiar  
23 with the fact that there's been inflation. Wages go up over  
24 time, just like prices do. Column No. 2 is the growth rate  
25 for wages over time.

1           Column No. 3 shows the amount that I project  
2 Ms. Barton would have earned from Metro as a human resources  
3 information systems specialist. And there's an amount for  
4 each year. You'll notice that they gradually go up every  
5 year with a little bit of inflation.

6           And then in column No. 4, I calculate employment  
7 benefits. And this is based on information Metro provided  
8 where employment benefits are valued at a certain percent of  
9 earnings.

10           In column No. 5, I show social security benefits.  
11 This represents the employer's contribution to the Social  
12 Security Administration on Ms. Barton's behalf. Social  
13 Security benefits are funded by Social Security taxes.  
14 Sometimes we call them the payroll tax or the FICA tax. The  
15 employee pays half of it, and they see that come out of their  
16 paycheck. The employer also pays half of that tax, whether  
17 we really see it or know it or not. And so column No. 5  
18 takes into account the amount that Metro would have paid to  
19 Social Security on Ms. Barton's behalf, and she would have  
20 ultimately received that in the form of benefits in the form  
21 of retirement benefits.

22           So Ms. Barton's compensation from Metro comes from  
23 Columns 3, 4 and 5. It's her earnings, her employer benefits  
24 and her government mandated benefits. And then from that,  
25 I'm going to subtract her compensation from Metro as a

1 substitute teacher. Her earnings as a substitute teacher are  
2 reflected in column 6, and her employment benefits are in  
3 column 7. This is the employer's contribution to Social  
4 Security that I discussed earlier. It's just based on her  
5 earnings as a substitute teacher, instead of her earnings as  
6 a human resources information systems specialist.

7           And then the loss in column 8 is just the  
8 difference in what I project she would have earned without  
9 the demotion and what I project she has the potential to earn  
10 with the demotion as a substitute teacher. In column No. 9,  
11 I weight each future year for the probability that Ms. Barton  
12 would have remained at Metro. We don't know for sure that  
13 between the demotion and her retirement that she would have  
14 remained at Metro. She probably would have, but there's some  
15 chance she might have changed jobs and gone to work for a  
16 different employer. And so I take that into account in  
17 column 9. Column 9 is the probability -- it's a percent --  
18 the probability that Ms. Barton would have stayed with Metro  
19 all these years absent the demotion. And you'll notice that  
20 they're somewhere between 0 and 100 percent.

21           So that in column 10, I calculate an adjusted  
22 loss. This is just the loss that I've already described  
23 weighted for the probability that Ms. Barton would have still  
24 been employed for Metro. In column No. 11, I add interest on  
25 the loss. Ms. Barton has been without the use of this money



1 for these years. And during that period of time, if she had  
2 had the money, she could have invested it and earned a small  
3 amount of interest. And so I take that into account in  
4 column 11. And then in column 12, it says "Total Loss."  
5 This is just the adjusted loss, plus that small amount of  
6 interest in column 11.

7 And then, as I mentioned earlier, the courts will  
8 expect me, as an economist, to discount future amounts to  
9 present value. And so columns 13, 14 and 15 are the inputs  
10 that economists use to take future amounts, like future  
11 losses, and to shrink them or discount them to present value.  
12 This process is based not only on the interest rate, which is  
13 in column 14, sometimes referred to as a discount rate, it's  
14 also based on time. The further out into the future a loss  
15 would have occurred, the more it is discounted. And so I  
16 keep track of the number of years into the future.

17 You'll notice for 2022 there's only a part of a  
18 year because 2022 is mostly over. It's November the 9th.  
19 And so that in column, let's see, 16, I take the total loss  
20 for the future years, and I shrink it or discount it to  
21 present value. So you'll notice those numbers getting  
22 smaller. And then in column No. 17, I just add up the  
23 numbers in column 18. It's a cumulative value, but it's kind  
24 of a running cumulative value. It's the total amount of the  
25 loss through a particular year.

1           And if you're interested in the total amount of  
2 the loss through all the years, which is through 2027, then  
3 that's the number in the bottom right-hand corner. That's  
4 the \$234,087 figure. And that was the number -- that's one  
5 of the several numbers that I read to you just a minute ago.  
6 When I was reading those numbers, they come from this table.  
7 When I was reading those numbers, I was giving you the total  
8 economic losses for a particular table.

9           And then right after that, I mentioned what part  
10 was back pay and what part was front pay. Here's what that  
11 means in my table: The back pay is just the part that's in  
12 the pretrial portion, kind of in the top section, before the  
13 trial date on November the 9th of 2022. And the front pay is  
14 just the future portion. It's the amount from the last six  
15 rows. So if you add the back pay and the front pay together,  
16 you should get the total amount.

17 Q.   Okay. And just to make sure that I'm understanding  
18 right, the portion where it says "Past," that's from the  
19 date -- the on or around date of her demotion to present, and  
20 then future is from present forward?

21 A.   Correct, to her projected retirement date.

22 Q.   Okay. I'm going to show you Table 2. I'm going to kind  
23 of show them next to each other if I can. The explanation  
24 you just gave for the columns, is it the same for Table 1 as  
25 it is for Table 2?

1 A. It is. You'll notice that the two tables are very, very  
2 similar. They have the same format, the same columns, the  
3 same rows. I just change one thing in Table 2.

4 Q. Okay. And what was the thing you changed in Table 2?

5 A. In Table 2, what I deduct is not Ms. Barton's potential  
6 earnings as a substitute teacher for Metro, what I subtract  
7 is her actual earnings. And let me make another comment or  
8 two about that. In Table No. 1, I am subtracting her  
9 potential earnings, which is about \$23,400 a year. This is  
10 what a substitute teacher for Metro could earn if they were a  
11 substitute teacher all the school days and worked about  
12 1900 hours a year.

13 That's Ms. Barton's potential replacement  
14 earnings, but it just so happens that she didn't earn that  
15 much. We know how much she earned because we have  
16 information from her tax records. And as it turns out, she  
17 did not earn that much. There's some reasons for this. One  
18 is, right after the demotion was summer, and there's not as  
19 much need for substitute teachers during the summer. Then we  
20 went through COVID, where there weren't as many classes being  
21 held, and so not as many substitute teachers were being  
22 hired. So as it turns out, Ms. Barton did not earn \$23,400  
23 per year as a substitute teacher. She earned amounts that  
24 are really quite a bit less.

25 And so in Table No. 2, what I am looking at is the

1 difference in what she could have earned without the demotion  
2 and what she actually earned as a substitute teacher. The  
3 amounts are a little different because she didn't actually  
4 earn that much as a substitute teacher.

5 Q. Okay. And what was the conclusion you came to as  
6 regards to the actual amount of her back pay damages?

7 A. Yes. In Table No. 2, the total amount of the economic  
8 losses again is in the bottom right corner. It's that  
9 \$378,921 figure. It goes up because I'm not subtracting as  
10 much. I'm not subtracting as much from the economic losses  
11 because Ms. Barton didn't earn as much as a substitute  
12 teacher. The back pay part is in the top panel. That is the  
13 \$200,358 figure. Yes. And then the front pay is just the  
14 total amount from those bottom six rows.

15 Q. Okay. And just to make sure I'm looking at this  
16 correctly, it's the -- it's this 200,258 at this corner?

17 A. Correct. That's the back pay, the total losses, the  
18 \$378,921 figure, and then the front pay would be the  
19 difference in the total loss subtracting out the back pay.

20 Q. Okay. What documents did you review or rely on to come  
21 up with these figures?

22 A. I had information from Ms. Barton's tax returns. The  
23 tax returns include W-2 forms that show how much you earn  
24 from employers, and I also had payroll records from Metro  
25 that described what Ms. Barton's annual salary was.

1 Q. Okay. If you could turn to page 35 of Exhibit 20.

2 A. Okay.

3 Q. Is this the portion of your report that actually has the  
4 copies of those documents that you just referenced?

5 A. Yes.

6 Q. Okay.

7 MS. WALTER: I don't have any other further  
8 questions.

9 CROSS-EXAMINATION

10 BY MR. FOX:

11 Q. Dr. Baum, we know each other; correct?

12 A. Yes.

13 Q. Now, can you explain to the jury how we know each other?

14 A. If you want me to. We've been in court together before  
15 on the same side before.

16 Q. Right. So there was an antitrust case; correct?

17 A. Yes.

18 Q. Against the Metropolitan Government?

19 A. Yes.

20 Q. And Metro and I hired you in that case?

21 A. Yes.

22 Q. Correct? You remember that? In fact, that case is  
23 listed in your CV?

24 A. Yes.

25 Q. And, likewise, in this case, opposing counsel has hired

1 you in this case; correct?

2 A. Yes.

3 Q. All right. And they are paying you to be here today;  
4 correct?

5 A. Yes.

6 Q. Is there anything in your numbers -- any of the numbers  
7 given to you that turn out to be inaccurate?

8 A. Not that I know of, no.

9 Q. Okay. So there's no changes or adjustments you need to  
10 make today of any of your calculations or any of the  
11 background data that you were given?

12 A. No.

13 Q. And in your report, you mention certain assumptions that  
14 you made, but one assumption is -- isn't it true that any of  
15 these damages that you've calculated, for them to be payable  
16 to Ms. Barton, there would first have to be a finding that  
17 Metro did, indeed, demote Ms. Barton; correct?

18 A. I understand that that's what the case is about. And so  
19 I project the difference in what her earnings would have been  
20 without the demotion and what her earnings were as a  
21 substitute teacher.

22 Q. So it's assuming she was, indeed, demoted; correct?

23 A. Yes.

24 Q. Yeah. And assuming that Metro is found guilty of  
25 violating her religious rights in this case; correct?

1 A. I assume that's what the case is about, but I'm not here  
2 to testify about liability. I think you're correct. I think  
3 the answer to your question is yes, but I'm here just to look  
4 at the economic damages.

5 Q. That just wasn't part of your analysis. You just did  
6 what they asked you to analyze; correct?

7 A. Yes.

8 Q. Okay.

9 MR. FOX: That's all. Thank you.

10 REDIRECT EXAMINATION

11 BY MS. WALTER:

12 Q. Dr. Baum, does the fact that you're being paid here  
13 today change the math?

14 A. No. My task as an economist is not to be an advocate.  
15 My task is to be objective and to make these calculations  
16 using numbers in an objective fashion.

17 Q. Math is math, numbers are numbers; is that right?

18 A. Correct. So my intent is to be objective. My day job  
19 is teaching economics at MTSU. This is just something I do  
20 on the side.

21 Q. Okay.

22 MS. WALTER: Your Honor, just as a matter of  
23 course, we'd like to enter Exhibit 23 into evidence. It's  
24 one of Ms. Barton's W-2s, and it's been stipulated to.

25 MR. FOX: No objection.

1 THE COURT: Without objection then, Exhibit 23 is  
2 admitted.

3 (Plaintiff's Exhibit 23 received in evidence.)

4 MS. WALTER: Thank you, Dr. Baum.

5 THE COURT: Anything else, Mr. Fox?

6 MR. FOX: No.

7 THE COURT: All right, Dr. Baum, you may step  
8 down.

9 (Witness excused.)

10 THE COURT: Next witness.

11 MS. WALTER: Your Honor, plaintiff calls Deborah  
12 Story.

13 COURTROOM DEPUTY: Raise your right hand, please.

14 DEBORAH STORY,

15 called as a witness, having been duly sworn, was examined and  
16 testified as follows:

17 THE WITNESS: Yes, I do.

18 COURTROOM DEPUTY: State your full name for the  
19 record, please, and spell your last.

20 THE WITNESS: Deborah Ellis Story, S-T-O-R-Y.

21 DIRECT EXAMINATION

22 BY MS. WALTER:

23 Q. Good morning, Ms. Story.

24 A. Good morning.

25 Q. I'm going to read a brief statement and then ask you if



1 everything is correct. Okay?

2 A. Okay.

3 Q. Deborah Story was employed by Metro Nashville Government  
4 as the chief human resources officer during 2018 until  
5 March 22, 2019. Prior to her position as chief human  
6 resources officer, she was the executive officer of Human  
7 Resources. She supervised Craig Ott, Selina Harris and Lisa  
8 Few. Ms. Story no longer works for Metro Nashville  
9 Government.

10 Is that all correct?

11 A. That is correct. I did not directly supervise Lisa or  
12 Selina. They were under Mr. Ott.

13 Q. Okay. Were they in the chain of your supervision?

14 A. Yes.

15 Q. Okay. All right. During the summer of 2018, do you  
16 contend that there was a rule limiting the ERC employees from  
17 taking vacation during the summer?

18 A. Yes.

19 Q. Okay. Is that rule written anywhere in policy?

20 A. I can't recall, but it was pretty well understood.

21 Q. Okay, but not written anywhere to your recollection?

22 A. I'm sure it is somewhere, but I'm not -- I can't confirm  
23 that.

24 Q. Okay. Did you know Carol Barton in 2018?

25 A. Yes.

1 Q. Okay. Were you aware that she was a practicing  
2 Jehovah's Witness?

3 A. Yes.

4 Q. Okay. In the spring of 2018, were you aware that  
5 Ms. Barton requested 12 days off for religious convention?

6 A. I can't remember how many days, but I remember she did  
7 request some time off, yeah.

8 Q. Okay. And was it your understanding that this had to do  
9 with her faith?

10 A. I had some understanding that -- yes. Yes, I did. Yes.

11 Q. Okay. And Ms. Harris and Ms. Story notified you of  
12 Ms. Barton's request for time off to attend --

13 A. Would you repeat that, please? I don't hear very well.  
14 So if you could speak a little louder.

15 Q. Absolutely.

16 A. Thank you.

17 Q. Ms. Harris and Ms. Story, did they notify you that  
18 Ms. Barton had requested time off to attend a religious  
19 convention?

20 MR. FOX: Objection. I think --

21 THE WITNESS: I'm not sure when --

22 MR. FOX: I think counsel means not Ms. Story.

23 MS. WALTER: Oh, sorry, Ms. Barton requested time  
24 off.

25 THE COURT: Ask the question again just so it's

1 clear for the record.

2 MS. WALTER: Sure.

3 BY MS. WALTER:

4 Q. In 2018, did Ms. Harris and Ms. Story notify you that  
5 Ms. Barton requested time off?

6 MR. FOX: Objection.

7 THE COURT: I think --

8 MS. WALTER: Oh, I'm so sorry. Yeah, I see.

9 THE COURT: Let's try it a third time.

10 MS. WALTER: Third time's the charm. I'll get  
11 there.

12 BY MS. WALTER:

13 Q. All right. Did Ms. Harris and Ms. Few in 2018 notify  
14 you of Ms. Barton's request for time off for a religious  
15 convention?

16 A. I was aware of the request. I'm not sure when that  
17 information was shared with me.

18 Q. Okay. Was it Ms. Few and Ms. Harris who notified you of  
19 it?

20 A. I don't remember if it was the two of them, either one  
21 of them, or someone else.

22 Q. Okay. At the time that they notified -- that someone  
23 notified you, did they tell you that the request had been  
24 denied for Ms. Barton?

25 A. I was aware that the request was denied, yes.

1 Q. Isn't it true that when an employee makes a request for  
2 a religious accommodation, the details of that request,  
3 including the time off, is important to consider?

4 A. Would you repeat the question again, please?

5 Q. Sure. Isn't it true that when an employee makes a  
6 request for a religious accommodation that the details of the  
7 request, including the number of days off and the time off,  
8 is important to be considered?

9 A. I'm not sure that it was presented as an accommodation.  
10 I don't believe that word was ever used. I don't recall that  
11 word being used with me.

12 Q. Okay. So you don't recall if Ms. Few told you that  
13 Ms. Barton had requested a religious accommodation?

14 A. I was understood -- I understood that it was she was  
15 requesting time off. The word "accommodation" was never  
16 used, that I can recall.

17 Q. Okay. In the event that an employee is requesting a  
18 religious accommodation, isn't it true that it's important to  
19 take into consideration the details of the request, including  
20 the amount of days off and why they're taking -- needing the  
21 time off?

22 A. Yes.

23 Q. Okay. And it's important that the employee should be  
24 heard out and given a chance to explain the details of the  
25 request before a decision is made when they request an

1 accommodation?

2 A. That should be, yes.

3 Q. Okay. You didn't make the decision to deny Ms. Barton's  
4 accommodation request, did you?

5 A. No.

6 Q. Okay. Did you have any conversations with Ms. Few or  
7 Ms. Harris about Ms. Barton's request and the details of her  
8 request?

9 A. I don't recall.

10 Q. They would have -- either Ms. Few or Ms. Harris would  
11 have just told you what their decision was with regards to  
12 the request?

13 A. Either they would have or their supervisor.

14 Q. Which would be Mr. Ott?

15 A. Yes.

16 Q. Okay. Did Selina Harris ever speak with you about  
17 trying to bring Carol Barton back to the ERC?

18 A. Not that I can recall.

19 MS. WALTER: I'm just going to check my notes. I  
20 don't have anymore questions.

21 CROSS-EXAMINATION

22 BY MR. FOX:

23 Q. Ms. Story, isn't it true that summertime is the busiest  
24 time of the year? That's the busiest season for the ERC?

25 A. Correct.

1 Q. Just as the school year is a busy time for the teachers,  
2 and they take a break during the summer, the ERC is on --  
3 their season is during the summer; correct?

4 A. Correct.

5 Q. And it was well-known in the ERC and the central office  
6 that vacation time would be very limited -- any kind of leave  
7 time would be very limited during the busy summer season;  
8 correct?

9 A. Correct.

10 Q. In your position as -- in 2018, were you the chief human  
11 resources officer?

12 A. Yes.

13 Q. Did you see anything that you felt like amounted to  
14 discrimination based on Ms. Barton's religious beliefs?

15 A. I did not see that, no.

16 Q. Anything that amounted to some type of retaliation, like  
17 trying to get back at her for making this request?

18 A. I never -- I never saw that.

19 MR. FOX: Okay, thank you. That's all.

20 REDIRECT EXAMINATION

21 BY MS. WALTER:

22 Q. Ms. Story, isn't it -- even during busy seasons,  
23 shouldn't -- is Metro still required to consider employees'  
24 requests for religious accommodations?

25 A. Would you repeat that again?

1 Q. Sure.

2 A. Okay.

3 Q. Even during a busy season, Metro still has a requirement  
4 to consider an employee's religious accommodation request?

5 A. I would say yes.

6 Q. Okay. And just to confirm, you were no longer the chief  
7 human resources officer on March 22nd of 2019; is that right?

8 A. Correct. That was my last day on payroll, March 22nd.

9 Q. Okay. When was your last day actually performing your  
10 duties as chief human resources --

11 A. I believe it was the 19th.

12 Q. Okay.

13 A. Uh-huh.

14 MS. WALTER: All right, no further questions.

15 MR. FOX: That's all.

16 THE WITNESS: The 19th of March, uh-huh.

17 THE COURT: You can step down, ma'am.

18 THE WITNESS: Okay, thank you.

19 (Witness excused.)

20 MS. COLLINS: Plaintiff calls Craig Ott.

21 COURTROOM DEPUTY: Raise your right hand, please.

22 CRAIG OTT,

23 called as a witness, having been duly sworn, was examined and  
24 testified as follows:

25 THE WITNESS: I do.

1                   COURTROOM DEPUTY: State your full name for the  
2 record, please, and spell your last.

3                   THE WITNESS: Craig Steven Ott, O-T-T.

4                                   DIRECT EXAMINATION

5 BY MS. COLLINS:

6 Q. Good morning, Mr. Ott. I'm going to read a brief  
7 statement and just correct me if anything I say in the  
8 statement is not accurate.

9                   Mr. Ott, you were the executive director of HR  
10 with Metro Schools in 2018. You were employed in that  
11 capacity from 2011 to 2019. And you reported to Deborah  
12 Story.

13 A. That's correct.

14 Q. Okay. And, Mr. Ott, you knew Carol Barton when she  
15 worked in the ERC; correct?

16 A. I did.

17 Q. And you knew that she was a good worker?

18 A. She was.

19 Q. And to your knowledge, she enjoyed working in the ERC?

20 A. To my knowledge.

21 Q. And you knew that she was a Jehovah's Witness?

22 A. I did.

23 Q. She was transparent in the workplace about her faith  
24 practices?

25 A. We didn't talk about that much.



1 Q. Okay. But she didn't try to hide that she was a  
2 Jehovah's Witness? You knew that?

3 A. She did not.

4 Q. Okay. Lisa Few also reported to you in 2018; correct?

5 A. That's correct.

6 Q. And Lisa Few had authority to make recommendations to  
7 you for hiring and firing decisions; right?

8 A. That's correct.

9 Q. And you were involved in transfers between departments  
10 when they occurred; correct?

11 A. Transfers within the school system or within HR?

12 Q. No, within HR.

13 A. Yes, I was.

14 Q. Okay. And Deborah Story approved the vacation freeze  
15 policy that was in effect in the ERC?

16 A. Not initially, but yes.

17 Q. Who initially approved it?

18 A. Probably June Keel. She was in place before I got  
19 there.

20 Q. Okay. And there were exceptions to the vacation freeze  
21 policy when they -- and they made them when they could;  
22 correct?

23 A. When we could, that's correct.

24 Q. Okay. And Selina Harris was initially responsible for  
25 considering exceptions; right?

1 A. That would have been Lisa Few with Selina Harris. I  
2 mean, there was a chain of command.

3 Q. Okay. And that chain of command ultimately went up to  
4 you; right?

5 A. Ultimately went up to the Director of Human Resources,  
6 whoever that was at the time or the -- yes.

7 Q. Okay. But you were above Ms. Few. So it went up to  
8 you, then ultimately Ms. Story, is what you're saying?

9 A. Correct.

10 Q. Okay. And when it came to you, you made any decisions  
11 based on Ms. Few or Ms. Harris's recommendations; correct?

12 A. State that again.

13 Q. When it came up to you, you made decisions based on  
14 Ms. Few or Ms. Harris's recommendations; correct?

15 A. If it came up to me, that's correct.

16 Q. Okay. And at that point, there would be consideration  
17 made whether to honor the request to take the vacation or  
18 time off during the black-out or freeze based on the time  
19 frame; correct?

20 A. Based on the amount of days requested, correct.

21 Q. Okay. And the closer you got to school, which started  
22 on August 1st, the opportunity to take vacation or request an  
23 exception was minimized?

24 A. I wouldn't say that's correct. I think it based -- it  
25 was based on the entire policy that we had in place.

1 Q. Okay. But the closer it got to that first day of  
2 school, the less chance there was that an exception would be  
3 approved?

4 A. I would say that would be correct.

5 Q. Okay. And you recall that Carol Barton made a request,  
6 but you didn't have the specifics provided to you; correct?

7 A. I don't recall that she made the request.

8 Q. Were you provided -- but you were provided  
9 information -- or were you provided information about her  
10 request?

11 A. Well, first of all, I don't even know what time frame  
12 we're talking about.

13 Q. Okay. In 2018.

14 A. Wow. Yeah, I don't recall specifics.

15 Q. Okay. Well, you were not provided information that  
16 Carol Barton's request off in 2018 was for a religious  
17 convention, were you?

18 A. You know, I know she made a couple of requests, but I'm  
19 not sure which year.

20 Q. Okay. And you don't recall either Ms. Few or Ms. Harris  
21 making you aware that Carol Barton requested to attend a  
22 religious convention, do you?

23 A. I don't.

24 Q. Okay. And if a request like that was brought up, it  
25 should have been discussed with you; correct?

1 A. If it wasn't already decided by either Lisa or Selina,  
2 that's probably correct.

3 Q. Okay. And you do not know whether Carol was told that  
4 she could either stay in her job or attend the convention?

5 A. No, I don't recall that.

6 Q. Okay. And you did not talk with Carol Barton about her  
7 request, did you?

8 A. No.

9 Q. And you do not know when the person who replaced Carol  
10 Barton started working?

11 A. I do not.

12 Q. And you had no role in the decision to approve or deny  
13 Carol Barton's request for religious accommodation, did you?

14 A. No.

15 Q. And you were not provided a copy of Carol Barton's  
16 letter of transfer, were you?

17 A. No. No.

18 Q. And you do not recall having any conversations with  
19 Ms. Few or Ms. Harris about whether or not it would have been  
20 an undue burden on the ERC to allow Carol to attend her  
21 religious conference?

22 A. In 2018?

23 Q. Yes.

24 A. I don't recall.

25 Q. Okay.

1 MS. COLLINS: That's all I have. Thank you.

2 THE WITNESS: Uh-huh.

3 CROSS-EXAMINATION

4 BY MR. FOX:

5 Q. Mr. Ott, isn't the summertime the very busiest time of  
6 year for the ERC?

7 A. Absolutely. It's -- it's the worst time for the Human  
8 Resources Department.

9 Q. And had there been a time, if you recall, in 2016 where  
10 there had been experiments to try to allow people to take a  
11 week or so of leave and that experiment failed?

12 A. We tried it, but you're right. I mean, when you have  
13 more than one person out of the office in that specific area,  
14 it's very difficult for the HR office to function.

15 Q. So then that's why this what we've been calling a  
16 vacation freeze policy was put into place --

17 A. Absolutely.

18 Q. -- for the following summer?

19 A. Again, the policy was in place before I even got there.

20 Q. Right. And it was well-known among the ERC employees,  
21 wasn't it?

22 A. It was.

23 MR. FOX: Thank you. That's all.

24 ///

25 ///

## 1 REDIRECT EXAMINATION

2 BY MS. COLLINS:

3 Q. When you say the policy was in place before you got  
4 there, what time frame are you referring to?

5 A. 2000 -- before I started.

6 Q. Which was?

7 A. Let's see, I think I was there in 2011. Yeah.

8 Q. Okay. Do you have a basis to dispute whether or not the  
9 vacation policy was first instituted in 2017?

10 A. No, I don't.

11 Q. Okay. But at any rate, this policy was never put in the  
12 employee handbook, was it?13 A. Correct, because it was -- it was department specific to  
14 HR because the HR Department within the school system is,  
15 like I said, the busiest during the summertime.16 Q. And that policy was not reduced to writing within the HR  
17 Department as some sort of departmental policy or mandate,  
18 was it?

19 A. No, it was not.

20 MS. COLLINS: Okay. Thank you.

21 THE WITNESS: Yeah.

22 MR. FOX: Nothing.

23 THE COURT: All right, sir, you can step down.

24 THE WITNESS: Thank you.

25 (Witness excused.)

1 MS. WALTER: Your Honor, we just need to check to  
2 see if the next witness is here.

3 MS. COLLINS: Your Honor, plaintiff calls Jessica  
4 Earnest.

5 COURTROOM DEPUTY: Raise your right hand, please.

6 JESSICA EARNEST,  
7 called as a witness, having been duly sworn, was examined and  
8 testified as follows:

9 THE WITNESS: I do.

10 COURTROOM DEPUTY: State your full name for the  
11 record, please, and spell your last.

12 THE WITNESS: Jessica Dawn Earnest, E-A-R-N-E-S-T.

13 DIRECT EXAMINATION

14 BY MS. COLLINS:

15 Q. Good morning, Ms. Earnest.

16 A. Good morning.

17 Q. I'm going to read out a brief statement, and you just  
18 correct me if I mess anything up. Okay?

19 A. Okay.

20 Q. You worked for Metro Public Schools in the ERC, the  
21 Employee Resource Center, from January 2017 to August 2018?

22 A. Correct.

23 Q. And you were in data entry and then later as a  
24 specialist, and Selina Harris and Lisa Few were your  
25 supervisors?

1 A. Correct.

2 Q. Okay. And when you left Metro, you went into the  
3 private sector?

4 A. Uh-huh.

5 Q. Okay.

6 A. Yep, that's correct.

7 Q. All right. When you were at the ERC, you worked with  
8 Carol Barton?

9 A. I did.

10 Q. Okay. And you found Carol to be a competent worker?

11 A. Yeah.

12 Q. And Carol had mentioned to you her religious  
13 affiliation; correct?

14 A. She never -- I don't remember her ever, like, mentioning  
15 exactly what her religious affiliation -- I do remember she  
16 said to me at one point something about doing ministries, but  
17 I never -- I never pushed it because it wasn't my business.  
18 So . . .

19 Q. Okay. But you did previously testify that you knew  
20 Carol had attended religious conferences; right?

21 A. Yes, I knew she had attended religious conferences, but  
22 again it wasn't my business. So -- it was her time off, her  
23 time off.

24 Q. Okay. You knew about the blackout period in the HR  
25 Department; right?



1 A. I did, yes. That was told to me in my interview  
2 process, and I agreed to it, and we all did.

3 Q. You recall that the blackout period was from May to the  
4 end of April to the last of August or early September;  
5 correct?

6 A. Correct, that's -- what I can recall, that sounds about  
7 right.

8 Q. Okay. But you also knew that during that period you  
9 could call out sick if you needed to?

10 A. Call out sick, yes, but I never needed to.

11 Q. Okay. And you took days off in the summer during 2018;  
12 correct?

13 A. I -- if I did, I don't remember. Sorry, that's been a  
14 little bit ago, and I -- yeah.

15 Q. Sure. Sure. Sure. I'm just -- if you could turn to a  
16 document that's in that binder right there. It says  
17 "Plaintiff's Exhibits."

18 A. Yes. Okay.

19 Q. And it is Exhibit No. 18, or tab 18, in that book.

20 A. Okay.

21 Q. And if you could turn to -- they're just really  
22 questions. And it's No. 8. And that is on page -- that is  
23 on page -- well, there are no page numbers, but --

24 A. Okay, you're asking for question -- the No. 8?

25 Q. Yes.

1 A. Is it the (as read): Admit that employees of defendant  
2 in the ERC Department with the schools -- department took  
3 days off during the period of April 2017 until August 2017?

4 Q. Yes. Yes.

5 A. Okay.

6 Q. So this deals with 2017 --

7 A. Okay.

8 Q. -- when you worked in the ERC Department. And these  
9 were records that were obtained from Metro Public Schools.  
10 Do you have any reason to dispute these records and the  
11 numbers that are listed with your name?

12 A. No, because, again, like I said, I -- this has been a  
13 few years, that if this is what the system pulled, then that  
14 must have been what was entered.

15 Q. Sure. Now, if you could also turn to question No. 3.

16 A. Okay.

17 Q. Goodness, this is confusing to me. Sorry. The lack of  
18 page numbers has got me a little messed up here. Let's do  
19 this. All right. And these are your -- this is your time  
20 from April of 2018. You don't have any basis to dispute that  
21 you took off 10.63 hours in April, do you?

22 A. No.

23 Q. Okay. And then with question No. 4, this is May of  
24 2018. You don't have any reason to dispute that you took off  
25 10.5 hours in the month of May 2018, do you?

1 A. No.

2 Q. And for question No. 5, which goes over into the next  
3 page, you don't have any reason to dispute that you took off  
4 13.75 hours in the month of June 2018, do you?

5 A. No.

6 Q. And then I think that that is all I have for you. Just  
7 one moment.

8 A. Okay.

9 Q. Let me check with my co-counsel.

10 MS. COLLINS: That's all I have.

11 THE WITNESS: All right, perfect. Thank you.

12 MS. COLLINS: Well, he's going to ask you some  
13 questions.

14 THE WITNESS: Oh, okay. I'm sorry.

15 MS. COLLINS: It's okay.

16 MR. FOX: No, I'm not. No questions.

17 MS. COLLINS: Okay.

18 THE COURT: Now you can step down, ma'am.

19 THE WITNESS: All right. Thank you.

20 (Witness excused.)

21 MR. FOX: Sorry, Your Honor, trying to coordinate  
22 the appearance of witnesses.

23 THE COURT: Okay.

24 MS. WALTER: Your Honor, we'd like to call Diego  
25 Perez Romero.

1                   COURTROOM DEPUTY: Raise your right hand, please.  
2                   DIEGO PEREZ ROMERO,  
3 called as a witness, having been duly sworn, was examined and  
4 testified as follows:

5                   THE WITNESS: That's right.

6                   COURTROOM DEPUTY: State your full name for the  
7 record, please, and spell your last.

8                   THE WITNESS: Diego Perez, P-E-R-E-Z.

9                   DIRECT EXAMINATION

10 BY MS. WALTER:

11 Q. Good morning, Mr. Perez. I'm going to read a short  
12 statement and just let me know if anything is incorrect.

13 A. Okay.

14 Q. Okay. Diego Perez was employed by Metro Nashville  
15 Government from November 2017 until October 2019. He  
16 primarily worked at the Employee Resource Center as an ERC  
17 clerk during the relevant time frame. He was supervised by  
18 Selina Harris. Mr. Romero no longer works for Metro  
19 Nashville Government.

20                   Is that all right?

21 A. Correct.

22 Q. Okay. All right, Mr. Perez, did you work with Carol  
23 Barton?

24 A. Yes.

25 Q. Okay. Was she a good co-worker to work with?

1 A. Yes.

2 Q. Was she good at her job?

3 A. Yes.

4 Q. Okay. Were you aware when you worked with her that  
5 Ms. Barton is a Jehovah's Witness?

6 A. Yes.

7 Q. Okay. During your employment in the ERC, was there a  
8 vacation freeze?

9 A. Yes.

10 Q. Okay. Was that written down anywhere?

11 A. Like on a form that they give us?

12 Q. In a policy or --

13 A. Not that I know of.

14 Q. Okay. And when you were hired into the ERC in November  
15 of 2017, were you notified of the vacation freeze at that  
16 time?

17 A. No.

18 Q. Okay. When were you first told that there might be a  
19 vacation freeze?

20 A. Before the summer of my first year from 2018, but I  
21 don't remember when the exact time. February I said will be  
22 my guess.

23 Q. Okay. And what was your understanding of when the  
24 freeze ran from? When did it start and when did it end?

25 A. The summertime, when the school is out, and before the

1 school start, like the summer time frame.

2 Q. Would that be May to September?

3 A. Yes.

4 Q. Okay. And you worked with Ms. Barton in the summer of  
5 2018; is that right?

6 A. That is correct.

7 Q. Okay. And were you still in the ERC in the summer of  
8 2019?

9 A. Yes.

10 Q. Okay. In your experience in both of those summers, was  
11 the workload comparable?

12 A. Yes.

13 Q. One summer wasn't significantly more work than the  
14 other?

15 A. Not from my perspective, no.

16 Q. Okay. In both those summers, 2017 and 2019, did you  
17 work with Ms. Harris?

18 A. Yes.

19 Q. Okay. What about with Ms. Few?

20 A. Yes.

21 Q. Okay.

22 A. Well, I believe Ms. Few was transferred sometime --  
23 somewhere down the line, but I don't know the exact days,  
24 though.

25 Q. Okay. Was Ms. Harris's workload between the summer of

1 2019 and the summer of 2018 -- was her workload any  
2 different?

3 A. I mean, I don't know how I would say about the same,  
4 but -- I don't -- I'm not really sure.

5 Q. Sure. From your observation of working with her.

6 A. I would think it would be about the same.

7 Q. Okay. And regardless of the summers, employees were  
8 working some weekends and some evenings during both those  
9 time frames?

10 A. That's correct.

11 Q. Okay. And Ms. Barton's absence for a religious  
12 convention during the summer of 2018 did not affect your  
13 workload, did it?

14 A. I will say no if you compare it with the next year.

15 Q. Okay.

16 MS. WALTER: All right, that's all I have.

17 CROSS-EXAMINATION

18 BY MR. FOX:

19 Q. Mr. Perez, good morning.

20 A. Good morning.

21 Q. I'm Brook Fox, and I represent the school system in this  
22 case. During this time frame, did you have any supervisory  
23 responsibility at the ERC or any management responsibility at  
24 the ERC?

25 A. No.

1 Q. Did you ever work midnight or 1 in the morning with  
2 Ms. Harris or Ms. Few?

3 A. No.

4 MR. FOX: That's all. Thank you.

5 MS. WALTER: I have no other questions.

6 THE COURT: Okay, sir, you can step down.

7 (Witness excused.)

8 MS. COLLINS: Your Honor, can we take our  
9 mid-morning break a little bit early? I think we're still  
10 waiting on Ms. Overstreet. She's on her way over.

11 THE COURT: Sure. Yes, we'll go ahead and take  
12 our mid-morning break. I mean, any forecast on how far away  
13 she is?

14 MR. FOX: About 20 minutes.

15 THE COURT: Okay. We'll plan on coming back at  
16 10:30, give you a little extra long break, members of the  
17 jury. And hopefully we've got snacks in the back for you. I  
18 don't know how healthy they are, but they're back there,  
19 nonetheless. So we'll take our break, come back at 10:30.  
20 Again, please don't discuss the case with each other or  
21 anyone else.

22 (The jury was excused from the courtroom at  
23 10:07 a.m.)

24 THE COURT: Okay, be seated, please. So we've  
25 got -- you said Ms. Overstreet is on the way?



1 MS. COLLINS: Yes. We just have Ms. Overstreet  
2 and Mr. Barton. Mr. Barton is also on his way. So he might  
3 be here in like ten minutes, but I guess I should have  
4 anticipated the warp speed again. I never had a trial go so  
5 fast.

6 THE COURT: It's moving at a good pace, I'll say  
7 that. Well, based on my scorecard, that looks like you got  
8 Ms. Overstreet, you got Mr. Barton. Are Ms. Hawkins or  
9 Mr. Bosi going to be called?

10 MS. COLLINS: No, we're not calling them.

11 THE COURT: Okay. So these are the last two  
12 witnesses for your case?

13 MS. COLLINS: Yes.

14 THE COURT: All right. Do we expect to be able to  
15 finish those before lunch?

16 MS. COLLINS: Oh, yeah.

17 THE COURT: Okay. So we could end up taking an  
18 early lunch then and perhaps a long one because we've got to  
19 continue to try to work on the jury instructions.

20 Any forecast on what the afternoon holds for  
21 proof? Because Ms. Overstreet is about to testify, and  
22 you've already -- after she does, that will be three of your  
23 four listed witnesses, although you may want to recall them  
24 in your case, I understand that.

25 MR. FOX: Right. Right. We may want to recall

1    them, but I think we could finish proof this afternoon.

2               THE COURT: Okay. All right. So we may be able  
3    to -- and then depending on what they put on, there may or  
4    may not be some rebuttal. I realize you don't know that  
5    until you've heard the proof. We may be able to do our  
6    charge conference in the morning, have them come in a little  
7    later, and then -- I mean, I think we're really just down to  
8    a couple of charges that are going to be at issue, I think.

9               But we can get that taken care of and perhaps even  
10   do closings tomorrow morning, maybe early afternoon. My  
11   concern is that with the long weekend, if they start  
12   deliberating tomorrow -- I mean, they may render a verdict,  
13   or they may not be able to and have to come back. Then we're  
14   talking about coming back Monday. We can do that, but it's  
15   not ideal because it's a three-day break in the middle of  
16   deliberations. But that's where we may find ourselves.  
17   So . . .

18              Those are the things I'm thinking about, just to  
19   be transparent with you-all, but that shouldn't impact the  
20   proof you put on or the pace we go. I'm just thinking out  
21   loud so that we can also start thinking about timing of  
22   closings and so forth. So continue to think about it. And  
23   if we get through the proof today, then we'll see where we  
24   find ourselves. We may be able to get you a charge after  
25   lunch, and we'll see -- may be able to wedge in the charge

1 conference today, depending on how much time you-all think  
2 you need to look at it, but I think the issues are pretty  
3 well crystalized at this point. It's just a matter of having  
4 the conference.

5 So we'll come back at 10:30 and see where we go.

6 (Recess taken from 10:13 a.m. to 10:38 a.m.)

7 THE COURT: We have our witness?

8 MS. COLLINS: She was going through security.

9 They saw her pull in the parking lot five minutes ago.

10 THE COURT: Okay.

11 MS. COLLINS: We're tracking her. If we had  
12 drones, we would really have a better idea, but we don't.

13 THE COURT: Well, we'll just wait a minute and --

14 MS. COLLINS: Yeah, Erica is going to bring her  
15 straight in.

16 THE COURT: Okay. We'll all stare with bated  
17 breath at the back door waiting.

18 (Short pause.)

19 THE COURT: All right, let's go ahead and bring in  
20 our jury.

21 (The jury returned to the courtroom at 10:41 a.m.)

22 THE COURT: Okay, be seated, please. All right,  
23 next witness.

24 MS. WALTER: Your Honor, the plaintiff calls  
25 Christy Overstreet.

1                   COURTROOM DEPUTY: Raise your right hand, please.  
2                   CHRISTY OVERSTREET,  
3 called as a witness, having been duly sworn, was examined and  
4 testified as follows:

5                   THE WITNESS: I do.

6                   COURTROOM DEPUTY: State your full name for the  
7 record, please, and spell your last.

8                   THE WITNESS: Christy Annette Overstreet,  
9 O-V-E-R-S-T-R-E-E-T.

10                   DIRECT EXAMINATION

11 BY MS. WALTER:

12 Q. Good morning, Ms. Overstreet. I'm going to read a brief  
13 statement, and if there's anything incorrect, just let me  
14 know.

15 A. Okay.

16 Q. Christy Overstreet has been employed by Metro Nashville  
17 Government from early 2016. On July 13, 2018, she began  
18 working in the ERC as a clerk. Her supervisor during the  
19 summer of 2018 was Selina Harris. Ms. Overstreet currently  
20 works for Metro Nashville Government.

21 A. That's correct.

22 Q. Okay. Where did you work prior to July 13, 2018, for  
23 Metro Government?

24 A. In the compensation office.

25 Q. Okay. And was there training -- did you require

1 training when you moved from that office into the ERC?

2 A. Did I require -- did it require training?

3 Q. When you moved over into the ERC, did you have to be  
4 trained?

5 A. There was a few things, but I already knew a lot of it  
6 from where I was in the compensation office because the  
7 compensation office and the ERC works real close together.

8 So I just jumped in and helped do what I knew I could do and  
9 then got trained on the things that I didn't how to do yet.

10 Q. Okay. What were the things that you didn't know how to  
11 do?

12 A. Like enter in information because I just did the pay  
13 side of it. So I didn't do like all of the new hires,  
14 rehires. But I knew the gist of it, so it didn't take long  
15 to -- I sat with somebody for like a day or two, and then I  
16 started entering in people.

17 Q. Okay. So you had to learn how to enter all the new  
18 paperwork; is that right?

19 A. Yes.

20 Q. Okay. And you said it took just a few days to get you  
21 trained?

22 A. Yeah. On that part, yeah.

23 Q. On that part. What were the other things that you had  
24 to be trained on?

25 A. Just the regular -- how you answer phones, how you

1 answer emails, because the email volume was like hundreds a  
2 day, and just knowing like how to answer the emails.

3 Q. Okay. Did you have to learn the computer system?

4 A. No, I already knew it.

5 Q. Okay. How long do you think it took? Did it take a  
6 couple weeks to get you fully trained?

7 A. Yeah, about a week or two before I knew everything.

8 Q. Okay. If there's been testimony that it takes about six  
9 to eight weeks or even six to eight months to train a new ERC  
10 employee, would you have a reason to dispute that testimony?

11 A. No. Someone coming in that didn't know anything, it  
12 would take a while just because there's so many moving  
13 pieces, moving parts, that you have to do.

14 Q. Okay. But it took a couple -- a couple of weeks for you  
15 to be trained?

16 A. Uh-huh.

17 Q. Okay. And who trained you? Was it your supervisor or  
18 the other ERC employees?

19 A. I sat with Selina a couple of times. And then if I just  
20 had questions, I would go to the other team members and ask.

21 Q. Okay. And were you trained by Judith Hawkins?

22 A. I sat with her like maybe a couple times.

23 Q. Okay. What about Jared Bosi?

24 A. Yes.

25 Q. Okay. So while they're trying to do all of their work

1 during the summer of 2018, they're also having to train you?

2 A. Right.

3 Q. Okay. Is it fair to say that you weren't fully up to  
4 speed until late August of 2018 or later?

5 A. I mean, I can't really remember, it's been so long ago,  
6 but I know I just jumped in there and helped wherever I could  
7 because they were so -- so slammed.

8 Q. Okay. And there was -- there's been testimony that  
9 there was a vacation freeze during the summers in the ERC.  
10 Is that your understanding?

11 A. Yeah. Whenever I interviewed, that was the first thing  
12 they told me before I accepted the job.

13 Q. Okay. Were you still able to take days off during the  
14 freeze period?

15 A. Like maybe if it was a day or two here and there, like  
16 if I was sick, or my kids were sick. I tried not to because  
17 I knew it was going to put a burden on the other team  
18 members, but, I mean, it's not like we were in jail or  
19 anything, but you just couldn't take like a week or two  
20 vacation.

21 Q. Okay. If you could take a look at -- in the large  
22 binder, there's a tab marked 18. Do you see where that's at?

23 A. Uh-huh.

24 Q. Okay. And these have already been moved into evidence,  
25 but if you will look at No. 7, question No. 7. I think it's

1 page 5.

2 A. Uh-huh.

3 Q. Do you see that?

4 A. I do.

5 Q. I'll show it here as well. All right. And the numbers  
6 here are information that's been provided by Metro, and it  
7 reflects that you took off 43 hours during the month of  
8 August 2018.

9 Do you have a reason to dispute that that's  
10 correct?

11 A. That's correct.

12 Q. Okay. All right. And then did you work in the ERC  
13 again in 2019?

14 A. I did. I stayed there until 2022.

15 Q. Okay. Were you able to take off time in 2019 as well?

16 A. No. My family and I, we always used to take vacation in  
17 June, and we had to move it to August, when the busy season  
18 was over.

19 Q. Okay. If you turn two more pages, it's question 9, but  
20 it runs into the second page, if you'll take a look at that.  
21 All right. And, again, these are numbers based off of what  
22 Metro has provided. It reflects that you took off  
23 68 hours -- 68.62 hours between April and the end of August.

24 Do you have a reason to dispute that those are  
25 correct?



1 A. That's correct.

2 Q. Okay. And is it your understanding that you did not  
3 begin your job within the ERC until after Ms. Barton returned  
4 to work, or returned from her trip?

5 A. Did I start when she returned?

6 Q. Let me rephrase that. Are you familiar with Ms. Barton  
7 taking off time during the summer of 2018?

8 A. No.

9 Q. Okay. Let me just check my notes. Did you ever work  
10 with Ms. Barton?

11 A. I did not.

12 Q. Okay.

13 MS. WALTER: No more questions.

14 CROSS-EXAMINATION

15 BY MR. PUCKETT:

16 Q. Hi, Ms. Overstreet. I'm Ben Puckett representing the  
17 Metro Government. Just a couple quick questions for you.

18 A. Okay.

19 Q. The vacation freeze that we're talking about, that  
20 lasted from the second week in June through the first week in  
21 August; isn't that right?

22 A. That's correct.

23 Q. So those times that you were shown that you were taking  
24 off time, it fell maybe before or after --

25 A. Right, unless like --

1 Q. -- that freeze?

2 A. -- if somebody was sick, or if I was sick or something,  
3 might have a day or two or half a day or something like that.

4 Q. Right. I think you said you had to reschedule a family  
5 beach trip around this?

6 A. Yes, I did. We always had to go in August, instead of  
7 June.

8 Q. But you understood that the freeze was necessary;  
9 correct?

10 A. Yes, correct.

11 Q. That time for the ERC, those couple of months, even --  
12 even starting in April and maybe going through into August,  
13 but specifically from June through the first week of August?

14 A. Right, correct.

15 Q. That was the busiest time for the ERC; is that right?

16 A. Yeah, very busy.

17 Q. Very busy. And if the department fell behind, there was  
18 no way -- there was no way to catch up, other than working  
19 nights and weekends?

20 A. Exactly.

21 Q. So, for example, if you did want to take that family  
22 beach trip, there was no way for you to just sort of let your  
23 work stack up and catch up when you got back; isn't that  
24 right?

25 A. Oh, no, somebody would have to pick up my slack if I

1 left.

2 Q. Somebody would have to pick it up. I think you said you  
3 didn't want to take too much time off during that period  
4 because you would be a burden to your --

5 A. Exactly, yes. Even if I was sick, I was like I kind of  
6 want to try to go in because I don't want to leave my work  
7 for somebody else to do because --

8 Q. Because that work's not --

9 A. -- so much --

10 (Reporter clarification.)

11 THE WITNESS: I said I just -- I didn't even want  
12 to take a sick leave if I didn't have to because I didn't  
13 want to leave my work for someone else to have to do.

14 MR. PUCKETT: And I apologize for stepping on the  
15 end of the answer there.

16 BY MR. PUCKETT:

17 Q. Because that work wasn't getting done if you weren't  
18 doing it or if your co-workers weren't doing it?

19 A. Right, exactly.

20 Q. That's right. Now, how was the ERC -- how was the  
21 vacation freeze communicated to the employees at the ERC?

22 A. I don't know about the first year that I started because  
23 I came in in the middle of the freeze, but the next year it  
24 was an email that --

25 Q. It was an email.

1 A. -- Selina sent out to let everybody know.

2 Q. And Selina Harris had morning huddle meetings too; isn't  
3 that right?

4 A. Yes.

5 Q. And she would be very clear about the times that were  
6 sort of, you know, approaching a busy season?

7 A. Right. Like, the email was just like a general email  
8 between this month and this month. There could be like a  
9 whole month, or it could be ten days. We just knew whenever  
10 we went to that morning huddle if we were going to have to  
11 stay that day or not depending on how much came through like  
12 the night before.

13 Q. Yeah. And so when that second week of August -- second  
14 week of June came along through that first week in August,  
15 the morning huddles were clear, and there was no confusion  
16 about whether or not there was a vacation freeze?

17 A. Oh, no, it was very clear. Very clear.

18 MR. PUCKETT: That's all I have. Thank you,  
19 Ms. Overstreet.

20 THE WITNESS: Thank you.

21 REDIRECT EXAMINATION

22 BY MS. WALTER:

23 Q. Ms. Overstreet, you just testified that if you were  
24 sick, you didn't want to take time off; right?

25 A. Right.

1 Q. But you could during the freeze?

2 A. Yeah. I mean, yeah, we wasn't in prison or anything.  
3 So if you're sick, you're sick. I was just saying that I  
4 would hate to do it, but like if I had a fever, then, of  
5 course, I'm not going to go in and get everybody sick  
6 whenever there's work that has to be done.

7 Q. Okay. So you could take time off during the freeze for  
8 a medical reason?

9 A. Like if it was like a day or two.

10 Q. If you were sick for a few days, you wouldn't be able to  
11 take the time off?

12 A. I mean, I wasn't sick for a few days, so I'm not sure.  
13 I mean, I'm assuming we could, but it didn't happen to me.

14 Q. Okay. And you mentioned that you had to move a beach  
15 trip --

16 A. Uh-huh.

17 Q. -- because of the freeze?

18 A. Yes.

19 Q. Was the beach trip for any sort of religious purpose  
20 that you were going to take the time off?

21 A. No, it was just a family beach trip.

22 Q. Just a vacation?

23 A. Uh-huh.

24 Q. Okay. How many years were you working in the ERC?

25 A. From 2018 to March of 2022.

1 Q. March of 2022. During your employment in the ERC, did  
2 any employees take off time for medical leave or sick time  
3 during the summers?

4 A. Not that I'm aware of.

5 Q. You don't remember any co-workers?

6 A. Uh-uh. It's been a long -- long time ago.

7 Q. Okay.

8 MS. WALTER: No more questions.

9 MR. PUCKETT: Nothing further, Your Honor.

10 THE COURT: Ma'am, you can step down.

11 (Witness excused.)

12 MS. WALTER: Your Honor, the plaintiff calls Kenn  
13 Barton.

14 COURTROOM DEPUTY: Raise your right hand, please.

15 KENN BARTON,

16 called as a witness, having been duly sworn, was examined and  
17 testified as follows:

18 THE WITNESS: I do.

19 COURTROOM DEPUTY: State your full name for the  
20 record, please, and spell your last.

21 THE WITNESS: Kenneth Gomez Barton, B-A-R-T-O-N.

22 DIRECT EXAMINATION

23 BY MS. WALTER:

24 Q. Good morning, Kenn. I'm going to read just a brief  
25 statement, and let me know if anything I say is wrong.

1 Kenn Barton is Carol Barton's husband of 38 years,  
2 and he has been an employee of Metro Government since 2007.

3 Is that all right?

4 A. That's correct.

5 Q. Okay. Kenn, how did you and Carol meet?

6 A. We met at her home congregation Kingdom Hall of  
7 Jehovah's Witnesses. We met when we were both 16. And my  
8 aunt actually took me to her Kingdom Hall, and there we  
9 became friends. And then after that, six years later, with  
10 the parents' permission, we got married.

11 Q. And during that time, I think Carol testified that you  
12 guys would go out skating; is that right?

13 A. Yeah. She enjoyed roller skating. Not something that I  
14 caught onto, but she liked roller skating and was good at it.  
15 So yeah.

16 Q. All right, I'm going to jump a little ahead to the  
17 2017-2018 time frame. There's been testimony that Carol  
18 applied to be a delegate for the 2018 special convention.

19 Do you recall that?

20 A. Yes. Yes, I do. As the conventions are presented to  
21 all of the witnesses, that was the one that she was eagerly  
22 wanting to attend. So, yes, it was a Sri Lanka convention.

23 Q. Okay. What was Carol like during the application  
24 process?

25 A. Well, she was enthused because many people -- I mean,

1 many of Jehovah's Witnesses apply for those, but the criteria  
2 is critiqued because they want to send someone that could  
3 offer that deep encouragement to the people, as well as  
4 support, and then share in their common faith. Yeah, so she  
5 was really enthusiastic about applying.

6 Q. And she was ultimately selected for the 2018 convention  
7 to Sri Lanka?

8 A. Yes.

9 Q. What was she like when she found out she was selected?

10 A. It was -- it was great. She was wonderfully enthused.  
11 She was encouraged for the fact that she would be able to  
12 meet this different culture, understand their faith related  
13 to being one of Jehovah's Witnesses. So she was, as I would  
14 say, on the top of the moon being excited about it.

15 Q. Is participation in a convention like a calling?

16 A. Yes. If you are accepted, it's one of those things  
17 where it's a part of your faith, just like becoming baptized.  
18 It's a calling. It's a privilege to be selected. It's  
19 also -- as I would say, it draws you closer in a spiritual  
20 relationship with your faith and with God.

21 Q. What was Carol like when she went to notify her employer  
22 of needing time off?

23 A. Well, there was a little -- there was a lot of anxiety,  
24 a lot of uneasiness because we didn't really know whether it  
25 would be approved. And so she was -- I'd say anxiety,



1 anxious. She was just different because she didn't know what  
2 challenge was -- this was going to create.

3 Q. What was Carol like prior to having to transfer to the  
4 substitute department?

5 A. She enjoyed what she did. She loved helping people  
6 navigate certain HR issues that pertained to her -- her  
7 department. She was happy. Every day she enjoyed. She  
8 would get phone calls from people, or if we saw people out,  
9 she would -- they would say, "Hey, can I call you? Can I ask  
10 you a question?" You know, as long as it was nothing  
11 confidential in nature, she -- she enjoyed it.

12 Q. During the spring of 2018 and summer of 2018, was there  
13 a time that it became clear that Carol's request was going to  
14 be denied for time off?

15 A. Yeah, it was my -- as we discussed, as we prayed about  
16 it, I asked her, I encouraged her, say, "Hey, we need to let  
17 them know as soon as possible. This is a great privilege for  
18 you. So we want to be sure we're following the path of  
19 informing them so that dialogue can be established." So  
20 doing that, we thought or we discussed and we prayed, hey,  
21 hopefully this will be successful, but the outcome was  
22 different. And that kind of changed her demeanor all  
23 together.

24 Q. When you say it changed her demeanor, what do you mean  
25 by that?

1 A. Well, that level of enthusiasm of being accepted, then  
2 the level of I have to make a decision on going, then I have  
3 to make a decision on what it will be like to become a sub.  
4 So going from being in an office, helping individuals, going  
5 to the classroom. Now, again, she still wanted to help the  
6 students the best possible in that environment, but that was  
7 kind of a transition for her, which caused that anxiety and  
8 nervousness and uncertainty.

9 Q. Is Carol a pretty positive person?

10 A. Yes. Yes, she is.

11 Q. Did that change during this time frame?

12 A. Her positive feelings were still there. She was just  
13 trying to process her steps, the step of going to a class  
14 room, the step of the situation that had occurred on not  
15 being able to attend, the situation that occurred as she went  
16 through the process of trying to work with the department to  
17 get that. So as she went along, she processed those steps,  
18 and as she did, you know, it changed. It changed her.

19 Q. I think you testified that Carol was stressed. What did  
20 that look like?

21 A. Not being able to sleep at times. Certainly, we had  
22 discussions. There were moments where we would go walking  
23 and just talk through the situations. I always let her know  
24 that, you know, talking is a good way to process those  
25 feelings. She would have her down moments. She would have

1 her moments of being silent. She would have her moments  
2 of -- we would discuss what's wrong with me, what did I do,  
3 what's, you know -- did I -- you know, did I do anything?  
4 And then, of course, we prayed together all the time, each  
5 and every day. So things of that nature.

6 Q. When you say there were down moments, what did those  
7 look like to you?

8 A. Well, sometimes a little isolation, you know, being in a  
9 home, you know, we would sit together, watch movies or  
10 whatever, and it would just be moments that I would just view  
11 her and see that she was kind of in a depressed or down  
12 state. Even our children would come by and say, "Hey,  
13 what's -- is mom okay?" And I would go, "Well, mom's just  
14 processing some things. So she may need her space," you  
15 know.

16 Q. When Carol requested -- when Carol put in a letter of  
17 transfer, how did she appear during that decision?

18 A. Again, that process of nervousness, anxiety, emotional  
19 kind of roller coaster, that was all there because she was  
20 going into uncertain territory, you know. Not that she  
21 didn't try to take as much positive energy that she could,  
22 but the point was it was uncertain, you know.

23 Q. At some point in time, Carol was requested to come back  
24 and work within the HR Department on a temporary basis. From  
25 your perspective, did that have any effect on her that you

1 could see?

2 A. No. I think, again, she processed being positive about  
3 the situation and not -- trying not to let that cloud  
4 continue to follow her through the things that she was -- was  
5 ahead of her. So at that point I just said -- you know, we  
6 prayed about it. I said, "Hey, follow -- follow your heart,  
7 and we'll leave it in our creator's hands to bless us through  
8 it."

9 Q. As a result of Carol's transfer, has there been an  
10 effect on finances?

11 A. Yes. We, trying to build our relationship of being  
12 married, we would take a couple vacations a year. Carol, she  
13 likes cruises. I like going to the beach. So we've had to  
14 adjust and cut down our travel because of budgets, and we  
15 would do things locally that would cause less expense. So,  
16 yeah, we had to adjust that avenue of our life.

17 Q. Were conventions part of that?

18 A. Yes. Number one is we always plan for our conventions.  
19 So that was always first priority. So we would budget for  
20 those, three a year, and we would always have fun set aside.  
21 And then whatever we had left after other obligations, we  
22 will work from there.

23 Q. After being married for 38 years, does time together  
24 matter for Ms. Barton that you can tell?

25 A. Yes. Yes, it matters a great deal. We support each

1 other. The chemistry -- you know, a lot of people say 50/50,  
2 but, no, it's not 50/50. It's 100/100 because you both want  
3 to give what you can. Certainly, that's what we've done  
4 through this situation.

5 Q. Was there any effect on Ms. Barton's mood or health  
6 throughout the process in the summer of 2018?

7 A. Well, to me, not getting sleep, feeling anxiety and  
8 depression, those are warning signs. Again, I'm not a  
9 doctor, but these are warning signs. You've got to take care  
10 of yourself, and sleep is important. So we discussed kind of  
11 better developing our doctors' visits and putting questions  
12 before the doctor. How is the blood pressure? How is these  
13 various levels of health? And that was a concern.

14 So we stepped up going to the doctor because we  
15 wanted to be sure we could, you know, curb that, or if we saw  
16 a warning sign because of stress, anxiety, we could cut  
17 that -- we could try to handle it.

18 Q. Was there a health effect from the stress and anxiety?

19 A. Well, her blood pressure did increase, and the doctor  
20 suggested blood pressure medicine to -- in a preventative  
21 way, and we would just monitor it. We would go every three  
22 months to make sure it stayed within reasonable levels from  
23 that standpoint.

24 Q. After being married for 38 years, what is your  
25 observation of the role that Carol's faith plays in her life?

1 A. As when we met, even at a young age, we talked about our  
2 faith. And my wife's faith has been strengthening, not only  
3 for me, but for her, and it plays a number one role in her  
4 doing things, how she views people, how she views life. So  
5 it's a number one priority. And that's what has helped us as  
6 a couple continue as long as we have.

7 MS. WALTER: Okay. I don't have any other  
8 questions.

9 MR. FOX: No questions, Your Honor.

10 THE COURT: You can step down, sir.

11 MS. COLLINS: Your Honor, plaintiff rests.

12 THE COURT: Okay.

13 MR. FOX: Your Honor, we have a motion to make  
14 under Rule 50.

15 THE COURT: Okay. Members of the jury, we're  
16 going -- well, let me back up and say trials are very fluid  
17 things, and sometimes they move slower, and sometimes they  
18 move faster. This one happens to be moving a little bit  
19 faster than I think anybody anticipated. That's not to say  
20 that we won't slow down again, but for now we're ready to  
21 take a break. We're going to go ahead and do the lunch break  
22 because it's going to be a fairly long lunch break because we  
23 have to deal with some other things, and we'll get you back  
24 in here.

25 We'll plan on coming back at -- we'll do 12:45.

1 That will give you a little over an hour and a half to go  
2 find something to eat and maybe enjoy a pretty day, but just  
3 be ready to start back at 12:45. If it's going to be much  
4 past that, we'll certainly send word, so you're not wondering  
5 why you're sitting back there cooling your jets. So . . .

6           Hope everybody enjoys lunch. Again, please don't  
7 discuss the case with each other or anyone else, do any  
8 independent research on anything related to the case, just  
9 put it out of your mind and enjoy your lunch and perhaps a  
10 pretty fall day.

11           (The jury was excused from the courtroom at  
12           11:11 a.m.)

13           THE COURT: Be seated, please. All right, you  
14 have a motion to make, Mr. Fox?

15           MR. FOX: Yes, Your Honor. As I understand it,  
16 the plaintiff has two claims in this case, a failure to  
17 accommodate a religious belief or religious request and  
18 retaliation. For the prima facie case -- the primary case  
19 from the Sixth Circuit is *Reed versus International Union*.  
20 It's at 569 F.3d 576. And there it talks about the prima  
21 facie case for a failure to accommodate case like this.

22           And the primary element that I want to hone in on  
23 is she has to establish through the proof that she was  
24 discharged or disciplined for failing to comply with the  
25 conflicting employment requirement. Here, there has been

1 insufficient proof -- no proof that there was actually a  
2 discharge. I actually asked Ms. Barton "Show me the  
3 termination letter." And she said, "I wasn't terminated."  
4 There's no discharge or discipline. We heard proof through  
5 Ms. Few that there was no disciplinary action taken. There  
6 has been a lack of evidence from the plaintiff's evidence,  
7 the plaintiff's documentation and testimony, that there was  
8 any discipline involved.

9           In summary judgment, there was some mention of  
10 like a constructive discharge, but that's something that has  
11 to be very specifically alleged in the complaint. And the  
12 amended complaint in this case is at Docket No. 14. There's  
13 been no allegation of constructive discharge. I did a  
14 control F of the PDF just to make doubly sure this morning.  
15 There's no allegation -- the words "constructive discharge"  
16 don't appear anywhere in the complaint, and she hasn't put on  
17 any sufficient proof to establish that things were so  
18 unbearable she had to leave anyway.

19           But the point of the matter is, under that *Reed*  
20 case, she has to show that the government took some action  
21 against her, and just denying of the accommodation itself is  
22 not sufficient. It can't be all rolled into one. She has to  
23 show some independent action from the employer that a  
24 discharge or discipline took place, and she hasn't proved  
25 that.



1           And then next, even if she were to have proved  
2 that, Your Honor, it switches the burden to -- she has to  
3 counter our defense, essentially, that there's a hardship  
4 upon the employer. There's been insufficient proof to  
5 counter the concept that there was undue hardship upon the  
6 employer. The proof that came out in her case was that there  
7 was more than de minimis, which has been defined by the  
8 Sixth Circuit as if it puts any kind of strain on co-workers,  
9 then that's an undue hardship. An employer should not have  
10 to dump other work upon co-workers or even management, like  
11 Ms. Few and Ms. Harris. We've heard that multiple times,  
12 about how they had to pick up her work, which is data entry,  
13 and they would have had to -- ahead of time, they would have  
14 had to have done that, and that's why they denied the  
15 request. And we know the proof is in the pudding that when  
16 she did actually leave, they did actually have to work nights  
17 and weekends to do her work, not just their work, but also  
18 her work. An employer is not supposed to be put in that  
19 situation under Sixth Circuit law because that's more than a  
20 de minimis hardship. It's an undue hardship.

21           And for those reasons, her failure to accommodate  
22 claim should fail and shouldn't even be sent to the jury.  
23 There should be a directed verdict here by Your Honor that  
24 the Metropolitan Government wins that point.

25           The next claim is her retaliation claim. And

1 retaliation, there's some case law that was cited as  
2 authority for our -- in our jury instructions that we  
3 submitted. One case, in fact, is from the Middle District, a  
4 Judge Richardson case. It talks about how the retaliation  
5 can't be the same set of events that gave rise to the failure  
6 to accommodate. Like, you can't just say, "Oh, they failed  
7 to accommodate my request" and say, "Well, that's failure to  
8 accommodate," and also turn right around and say, "Oh, and  
9 that same thing, that was also retaliation." That's not how  
10 these kinds of retaliation claims work.

11           Instead, she has to show that she engaged in  
12 specific protected activity under Title VII in opposition and  
13 show that she was in opposition to the -- that she complained  
14 or did something in opposition to the policy, not just ask  
15 for leave, and then it was denied. That's not sufficient.  
16 And then thereafter, you have to show -- she has to show,  
17 this is her burden, that the employer took some type of  
18 materially adverse action against her. And, of course, we  
19 all know post-*Burlington Northern*. It no longer has to be as  
20 severe as a demotion or a dismissal or a dock in pay, but she  
21 hasn't identified here what the opposition was, what she did  
22 in opposition, and then what it was that was done in adverse  
23 employment action because of that.

24           And that's the next element, is because of. It  
25 has to be a but-for causal connection to that protected

1 activity that she claims to have engaged in. She hasn't  
2 proved any of those points. And let me just cite a case --  
3 just for the record, I have a case in front of you,  
4 Your Honor, that we've referred to. In summary judgment, we  
5 cited this, but, for instance, *Kenney*, K-E-N-N-E-Y, *versus*  
6 *Aspen Tech*. And that's 965 F.3d 443. And specifically I  
7 cite a pinpoint cite at page 448. That's a Sixth Circuit  
8 case from 2020.

9           And I know you're well familiar with the elements  
10 of retaliation, so I don't want to belabor that, but there's  
11 just been insufficient proof, like I said, that were  
12 protected activity, in opposition, you know, in the  
13 employer's face confronting a particular policy and then  
14 opposing it and then something done because of a but-for  
15 causal connection in retaliation.

16           So for all those reasons, we feel like the case --  
17 that case shouldn't go to the jury either, and that there  
18 should be a directed verdict instead.

19           THE COURT: Okay, thank you.

20           MR. FOX: Thank you.

21           MS. COLLINS: Your Honor, we believe that there  
22 are enough facts in dispute for a reasonable jury to  
23 determine whether or not her -- both her discrimination  
24 claims based on the failure to accommodate, as well as  
25 retaliation, should go to them. The standard is whether or

1 not a reasonable jury could find in favor of the plaintiff,  
2 and there have been sufficient facts presented over the past  
3 two days to establish that.

4           With respect to the first claim of discrimination,  
5 it was mentioned in the prima facie case. We're beyond the  
6 prima facie stage. We're now at trial. And so really it's  
7 the ultimate issue. Did the denial of accommodation cause  
8 her to be forced out of the department and given the choice  
9 that she was given? There were facts presented that she was  
10 given the choice, and she had no other choice. She could  
11 either stay in her job, or she could not go to the  
12 convention. Her accommodation was not discussed at all. It  
13 was just no. And so that resulted in an ultimatum. And that  
14 ultimatum led to her being forced out of the department.

15           So whether that's characterized as a constructive  
16 discharge, that's up to the jury to determine that that was,  
17 in fact, an adverse action. So there have been more than  
18 enough facts presented, including -- if you'll just bear with  
19 me, Your Honor.

20           THE COURT: Well, on the constructive discharge, I  
21 don't -- has there been a proposed instruction on that?  
22 Because that's got a very specific thing that we're asking  
23 the jury to decide, and I don't believe we've got -- either  
24 side has proposed an instruction on constructive discharge.  
25 I know it might have been discussed at summary judgment, but

1 we're well beyond that now.

2 MS. COLLINS: Yes.

3 THE COURT: So to the issue of -- succinctly put,  
4 an adverse employment action that counsel raised, if it's not  
5 constructive discharge, what is the jury going to be asked to  
6 find there?

7 MS. COLLINS: The transfer was the adverse  
8 employment action, the forced transfer. And with that  
9 transfer came a loss of benefits, a loss of pay, and a loss  
10 of status. She went from a full-time employee to a part-time  
11 employee. That transfer -- yes, she's still with Metro  
12 Government, so I don't think it would technically give rise  
13 to a constructive discharge instruction, but the transfer is  
14 an adverse action under the law.

15 THE COURT: Okay.

16 MS. COLLINS: The forced transfer.

17 THE COURT: What about the issue he raised with  
18 the undue burden on Metro that an accommodation would pose?

19 MS. COLLINS: Well, that she took -- Ms. Barton  
20 offered evidence to show that other employees took similar or  
21 more time off than her in the ERC department. There was  
22 disputed evidence as to what the time frame was for the  
23 freeze. We had some witnesses today testify that it was from  
24 April to the end of August. We had some that had the narrow  
25 time frame of April -- or June until August. But either way,

1 I think it's up to the jury to determine those disputed  
2 issues of fact, which time frame it was, because irrespective  
3 of whether it was June to August or if it was April to the  
4 end of August, the comparator evidence shows that other  
5 people took time off just as much, if not more, but also that  
6 people took off for FMLA, and they considered the request.

7           There was also testimony that they did not  
8 consider the request of Carol Barton contrary to the law.  
9 They just said no. So there was no even discussion as to  
10 whether or not it would be an undue burden. And today,  
11 Mr. Ott testified that there was not discussion as to whether  
12 or not it would be an undue burden.

13           THE COURT: Okay. All right, what about the issue  
14 of -- what's the retaliation -- what's the proof on  
15 retaliation separate from the failure to accommodate?

16           MS. COLLINS: Separate from the failure to  
17 accommodate, the proof is that she filed an EEOC charge. She  
18 filed it pretty quickly after she left. I believe the  
19 specific date was September 8th, if I'm recalling correctly,  
20 thereabout that time frame. But that was also in the time  
21 frame where she was going back and filling in part-time for  
22 Metro. She also testified that she had filled in for other  
23 positions, and she hadn't gotten any. And I believe, if I'm  
24 not mistaken, Carol also testified that she felt like that  
25 she was being blackballed or blacklisted.

1           THE COURT: Well -- okay. So you're saying that  
2 that -- her job opportunities in Metro post-EEOC charge serve  
3 as the basis for the retaliation?

4           MS. COLLINS: Not the independent basis. I think  
5 that it's one of the bases. I do believe that her requesting  
6 an accommodation is considered protected conduct under the  
7 law, and that, in and of itself, gives rise to a retaliation  
8 claim.

9           THE COURT: Right, but I think his point -- I  
10 think he cited this *Kenney* -- I'm going to go back and look  
11 at the cases, but while we're all here, this *Kenney versus*  
12 *Aspen* case that counsel suggests stands for the proposition  
13 that there has to be some independent factual basis for  
14 retaliation that is distinct from just the failure to  
15 accommodate.

16           So if the failure to accommodate claim is she's  
17 asked for an accommodation to attend a religious conference,  
18 and they failed to make that accommodation, okay, that goes  
19 in the first claim. The retaliation -- if Mr. Fox's summary  
20 of *Kenney versus Aspen* is correct, then there needs to be  
21 something else. And you've said the EEOC.

22           MS. COLLINS: Yes.

23           THE COURT: Okay. And so is that pretty much what  
24 the jury is going to be asked to decide on both of these  
25 claims?

1 MS. COLLINS: Yes. I think that, you know, there  
2 was a case cited *Abdi Mohamed versus 1st Class Staffing, LLC*,  
3 286 F.Supp.3d 884, Southern District of Ohio, 2017. I  
4 realize it's not a Sixth Circuit case. But it said the  
5 assertion of a right to a religious accommodation at work is  
6 protected conduct. I'm not familiar with *Kenney*. So I'm  
7 going to do the same thing you're going to do during the  
8 break and look it up, but -- I can't speak to that case.

9 THE COURT: And what was the -- you mentioned  
10 something Judge Richardson did. Was that summary judgment  
11 or -- because I think counsel is right, the Sixth Circuit  
12 seems to be pretty clear that the traditional *McDonnell*  
13 *Douglas* type of burden shifting analysis is utilized for  
14 summary judgment, but not necessarily for trial because that  
15 is the ultimate issue put to the jury.

16 What was Judge Richardson's --

17 MR. FOX: I have that case cite. I don't know --  
18 I don't have the posture here of that in front of me, but  
19 it's *Wyatt versus Nissan*. It's 2019 Westlaw 6682197. It's  
20 at 2019 decision.

21 THE COURT: Knowing Judge Richardson, I'm sure  
22 it's very succinct.

23 MS. COLLINS: It's probably 50 pages, with 48  
24 footnotes. So it might take a minute to get through it.

25 MR. FOX: Yes, and that's the one more



1 specifically where it said that retaliation can't arise out  
2 of the -- doesn't arise out of the same series of events as  
3 the failure to accommodate.

4 THE COURT: Got it.

5 MS. COLLINS: But was it a Title VII case or was  
6 it an ADA or religious accommodation case?

7 MR. FOX: Yeah, I believe --

8 MS. COLLINS: Because that would make a  
9 difference.

10 MR. FOX: I believe it was an ADA case.

11 THE COURT: Okay.

12 MS. COLLINS: Was it a failure to accommodate  
13 case?

14 MR. FOX: Failure to accommodate.

15 MS. COLLINS: I'm sorry, I don't mean to be --

16 MR. FOX: Yes.

17 MS. COLLINS: Sorry. I'm just taking over your  
18 job. Sorry.

19 THE COURT: You-all let me know when you're done.  
20 I'll be here. Okay. So I'm going to read these cases while  
21 we eat lunch, but any additional argument to make?

22 MS. COLLINS: I don't think so. I think we  
23 covered all the points.

24 THE COURT: Okay. Anything else, Mr. Fox?

25 MR. FOX: Your Honor, just that Ms. Collins said

1 that there was some conflict in testimony this morning, but  
2 there was only Jessica Earnest who bought into the idea it  
3 was April, but even she said "I believe," you know, something  
4 to that effect. She said, "It's been a long time." The  
5 proof that was pretty clear and not rebutted was that the  
6 freeze was from mid-June to August. But even so, it's been  
7 unrebutted in this case that it was the busiest time of the  
8 year, and that this request was going to put upon some burden  
9 upon co-workers. That alone is sufficient hardship to mean  
10 that there's no claim here for failure to accommodate.

11 THE COURT: Let me perhaps put it slightly  
12 differently, so I make sure I understand your argument. And  
13 that is, regardless of the beginning or end of the freeze  
14 period, whether it's April to September or a shorter period,  
15 the requested time off by Ms. Barton, without question, falls  
16 in the middle of that?

17 MR. FOX: That's right.

18 THE COURT: However you bracket it?

19 MR. FOX: Right.

20 THE COURT: And that that was the absolute busiest  
21 time?

22 MR. FOX: Yes.

23 THE COURT: Okay.

24 MR. FOX: Yes. And that was made clear to her.

25 And I believe just about everyone has testified that that was

1 absolutely the busiest time.

2 THE COURT: Okay. All right, I'm going to need  
3 to -- I'll take the motion under advisement. I need to take  
4 a look at these cases. I think part of it, too, could be  
5 impacted by how the jury instructions shake out. I know that  
6 there was a difference in a couple of the instructions that  
7 we're taking a look at and trying to settle on the right  
8 instruction.

9 Regardless of -- just in the interest of  
10 efficiency and using time well, we're going to try to get a  
11 draft charge out to you just so that you can be looking at  
12 that. I'll still give you a ruling on the motion. I need to  
13 go look at these cases. I'm not forecasting a ruling on the  
14 motion now, but just in the interest of efficiency, in the  
15 interest of making sure we make good use of the jurors' time,  
16 we'll try to get you a copy of the charge, and then we'll  
17 just see if we can wedge in a charge conference if we get to  
18 that point today, or we need to do it tomorrow, again, just  
19 talking -- planning in the event one or more of the issues go  
20 to the jury.

21 MR. FOX: Your Honor, may I make one more point?

22 THE COURT: Yes.

23 MR. FOX: In rebuttal to what Ms. Collins just  
24 argued, I want to point out something, that I believe I heard  
25 her say that the retaliation claim to a certain extent

1 extends from the charge that came in September 2018 as being  
2 the protected activity, but that's completely different than  
3 what she has in the plaintiff's theory in the pretrial order.  
4 In the pretrial order, she says that Metro's actions violated  
5 Barton's rights under Title VII that prohibited Metro from  
6 discriminating against her on the basis of her religion and  
7 retaliating against her because she requested a religious  
8 accommodation.

9           It says nothing in her theory anywhere in the  
10 pretrial order about retaliating against her for having filed  
11 an EEOC charge. And I think it's an important point.

12           MS. COLLINS: Well, the local rules of the Court  
13 say that my pretrial theory is supposed to be succinct and  
14 concise. It's not a complaint. I don't have to lay out  
15 every single fact or basis for a claim. It's supposed to be  
16 a paragraph long. So I was just following the local rules of  
17 the court.

18           THE COURT: No, I understand that. The pretrial  
19 order also says, though, the pleadings in the case are  
20 amended to conform to the pretrial order, and this final  
21 order shall supplant the pleadings. I'll take a look at that  
22 issue separately. I mean, the point of that, as I understand  
23 it -- and that's been around forever, since I was practicing.  
24 There's always that boilerplate language in all the pretrial  
25 orders. The point of that is so that it's crystal clear what

1 claims and defenses are being tried so that you don't wedge  
2 in some new claim that's never been litigated, or that if  
3 you're going to drop claims or defenses, that would be an  
4 opportune time to do it so that the parties know what the  
5 claims and defenses are and the Court knows what the trial  
6 will be about. But I will take a look at that as well. And  
7 it's a fair point Mr. Fox raises.

8 I don't want to put you-all on too tight a tether  
9 just because you probably need to go eat some lunch as well.  
10 What I'll have -- does Angie have a number for each side, a  
11 phone number for each side? If not, give her one. And if we  
12 get the jury charge, we'll just let you know, and you can  
13 come back.

14 What did I tell the jury, 12:45?

15 MR. FOX: 12:45.

16 THE COURT: Let's plan on coming back in at 12:20.  
17 And it may be -- I don't know if we'll need 25 minutes, but  
18 that way, just in case we do, we don't keep our jurors  
19 waiting any longer than we have to. And so we'll see  
20 everybody back here at 12:20.

21 (Recess taken from 11:35 a.m. to 12:35 p.m.)

22 THE COURT: All right, defendant has made a motion  
23 under Rule 50 for a judgment as a matter of law on both  
24 claims, both the -- well, on the claims that were mentioned,  
25 which is discrimination -- or failure to provide reasonable

1 accommodation and retaliation. And this will get to the  
2 issue of the jury charge that we're going to have to deal  
3 with at some other time.

4 Are there two or three theories that the plaintiff  
5 puts forward as to liability?

6 MS. COLLINS: Three.

7 THE COURT: Okay. There's discrimination,  
8 religious discrimination, there's failure to accommodate,  
9 there's retaliation?

10 MS. COLLINS: Yes.

11 THE COURT: Okay. All right. Under  
12 Rule 50(a)(1), if a party's been fully heard on an issue  
13 during a jury trial, and the Court finds that a reasonable  
14 jury would not have a legally sufficient evidentiary basis to  
15 find for the party on that issue, the Court may resolve the  
16 issue against the party or grant a motion for judgment as a  
17 matter of law against the party on a claim or a defense that,  
18 under controlling law, can be maintained or defeated only  
19 with a favorable finding on that issue.

20 It also goes on to say that under Rule 50(b), if  
21 the Court does not grant a motion for judgment as a matter of  
22 law under Rule 50(a), the Court is considered to have  
23 submitted the action to the jury subject to the Court's later  
24 deciding the legal issues raised on a motion no later than  
25 28 days after entry of judgment.

1           I will note that my Practice and Procedure Manual,  
2 which I realize people probably don't study very carefully,  
3 does contemplate a circumstance where if there's an expected  
4 Rule 50 motion -- if a party can anticipate the motion, it  
5 should give the Court advance notice no later than the  
6 pretrial conference and file a brief in support of the  
7 motion, otherwise, it will be heard on an oral motion and  
8 argument. In many cases, a ruling will be delayed until  
9 after a jury verdict.

10           So the reason I mention that is, it doesn't really  
11 change anything for this case, but if there's clear  
12 anticipation that such a motion will be filed, it's -- the  
13 reason I have that in my Practice and Procedure Manual is it  
14 just gives the parties and the Court more time to deal with  
15 different arguments and theories, recognizing that at the  
16 pretrial conference you haven't heard any of the actual  
17 evidence yet.

18           All right, as to the grounds for the motion, one  
19 argument raised by the defendant was that there's no proof of  
20 an adverse employment action. The Sixth Circuit stated in  
21 *Deleon versus Kalamazoo County Road Commission*, 739 F.3d 914,  
22 at page 919 -- it's a 2014 case. It says (as read): Even  
23 still our circuit has not foreclosed the possibility that a  
24 transfer not rising to the level of constructive discharge  
25 might, nonetheless, constitute a tangible employment action.

1           I think there was testimony presented to the jury  
2 that in the conversations early on with Ms. Harris and also a  
3 conversation that Ms. Barton relayed that she had with  
4 Ms. Few was that there was -- it was pretty much a take it or  
5 leave it scenario that would have necessitated a transfer if  
6 she chose to stay employed by Metro. Given that ruling in  
7 the *DeLeon* opinion that I've just cited, a transfer can  
8 constitute a tangible employment action. I think it was  
9 contemplated that that might be one of the outcomes of the  
10 request for leave that they were denying.

11           So I don't know that the fact that she wasn't  
12 terminated or disciplined is dispositive on the issue. I  
13 think a jury can find from that testimony there would be a  
14 legally sufficient evidentiary basis to satisfy that element  
15 of the failure to accommodate claim.

16           In terms of the undue burden, that one is a little  
17 bit troubling to me in terms of the proof, but I think that a  
18 reasonable jury would have a legally sufficient evidentiary  
19 basis on the -- based on the evidence that in the initial  
20 conversations in the months leading up to the time period at  
21 issue -- the vacation request time period, rather, that there  
22 were really no discussions had to whether or not there were  
23 other things that could be done to alleviate an undue burden.  
24 I don't think there's any question that having a person  
25 outside the ERC for a period of time during the busy time



1 placed a burden. The evidence, though, I think a jury could  
2 conclude that that undue burden could have been avoided with  
3 further discussion and the accommodation that the plaintiff  
4 claims should have been made.

5 So that's the basis for denying the Rule 50 motion  
6 on the failure to accommodate claim.

7 In terms of the retaliation claim, in *AC ex rel.*  
8 *JC versus Shelby County Board of Education*, 711 F.3d 687,  
9 Sixth Circuit case from 2013 -- this was an ADA case on  
10 accommodation -- said, quote (as read): Both this circuit  
11 and other circuits agree that requests for accommodation are  
12 protected acts.

13 And then there's other cases that the  
14 Sixth Circuit has followed that same reasoning, including  
15 *Hurttt versus International Services, Inc.*, 627 F.App'x 414, a  
16 2015 case out of the Sixth Circuit, and then other district  
17 courts have followed suit.

18 In terms of Judge Richardson's opinion on this  
19 issue that they have to be distinct acts, I think the request  
20 for accommodation clearly under Sixth Circuit law can be a  
21 protected act. Judge Richardson's opinion in the *Wyatt v*  
22 *Nissan* case, 2019, was relying on some cases out of New York  
23 that I think are somewhat questionable in their reasoning,  
24 with all due respect to those courts. Judge Richardson then  
25 sort of walked back that position a little bit, as I read it.

1 And I obviously have not had time to read these in great  
2 detail, but just last spring, in *Veith versus Tyson Fresh*  
3 *Meat*, which is a case I know you're familiar with,  
4 Ms. Collins, because it was your case, I think he  
5 distinguished *Wyatt* and kind of explained why, such that I  
6 don't think that he's taking a firm stance that there has to  
7 be really distinct concrete acts to constitute a basis for an  
8 accommodation claim versus a retaliation claim. And given  
9 that a request for accommodation is considered to be a  
10 protected act under clear Sixth Circuit authority, I think  
11 that the argument that the request for a -- the failure to  
12 comply -- failure to provide a reasonable accommodation is  
13 one distinct basis for a claim, and there has to be some  
14 other act.

15 I don't know that the EEOC -- post-EEOC conduct  
16 that we talked about before lunch break is consistent with  
17 the pleadings in this case, neither the original complaint,  
18 nor the pretrial order, but I also think that under the  
19 Sixth Circuit authority that it's not required that you have  
20 to segregate out separate acts in order to serve as the basis  
21 for a reasonable accommodation claim and then turn around and  
22 have a retaliation claim.

23 There's also a series of events here that I think  
24 the jury could conclude reasonably that once the request is  
25 made and told no and then other efforts are made and

1 continued to take no, that might itself constitute  
2 retaliation, even after the reasonable accommodation was  
3 denied.

4           So on that basis, I'll deny the motion on the  
5 retaliation claim, keeping in mind that, as I cited at the  
6 beginning of this, under Rule 50(b), there's ample  
7 opportunity for the parties to raise these issues again,  
8 should they so choose, once we have a verdict from the jury.

9           All right, we're about ready to have our jury back  
10 in. The jury instructions, we're still noodling a little bit  
11 on three of them, which are the three substantive ones. No  
12 surprise there. I'm going to try to get those to you here in  
13 the next few minutes. I need to go check on something before  
14 we bring the jury back in, and then we'll get those to you.  
15 And then -- I don't want to hamstring your ability to take a  
16 good look at these instructions, so I'm not going to force a  
17 charge conference today, depending on when we get done, but  
18 if you look at them, and you're ready to do it, we can do it  
19 today, depending on how long you-all take. You may take the  
20 rest of the afternoon, and a charge conference is certainly  
21 not going to happen today.

22           I have a fairly hard stop around 4 today, and then  
23 we're going to have to start a little later in the morning,  
24 but we'll wedge that in when we can. Hopefully, I'll get  
25 you-all copies to look at, and you can let me know whether

1 you think you're ready to go forward with a charge conference  
2 or whether you want the evening to think about it and come  
3 back with your ears pinned back on jury charge issues.

4           Okay? Clear as mud? All right, let me take a  
5 couple minutes to go check on something, and then we'll get  
6 our jury back in, and we'll proceed.

7           (Recess taken from 12:47 p.m. to 12:51 p.m.)

8           (The jury returned to the courtroom at 12:52 p.m.)

9           THE COURT: All right, be seated, please. All  
10 right, defendant's first witness.

11           MR. PUCKETT: Your Honor, defense would like to  
12 call Ms. Judith Hawkins to the stand.

13           COURTROOM DEPUTY: Raise your right hand, please.

14                       JUDITH HAWKINS,  
15 called as a witness, having been duly sworn, was examined and  
16 testified as follows:

17           THE WITNESS: Yes.

18           COURTROOM DEPUTY: State your full name for the  
19 record, please, and spell your last.

20           THE WITNESS: Judith Marie Hawkins, H-A-W-K-I-N-S.

21                       DIRECT EXAMINATION

22 BY MR. PUCKETT:

23 Q.    Good afternoon, Ms. Hawkins.

24 A.    Hi.

25 Q.    I'm going to read a quick bio, and you just correct me

1 if I say anything wrong, okay.

2 Judith Hawkins, you are currently the employee  
3 benefits lead specialist in the employee benefits department  
4 of Metro Schools. You worked in the Employee Resource Center  
5 as a clerk from December 2016 to January 2019. You have been  
6 with Metro for 14 years. Approximately 11 of those years  
7 were spent in HR.

8 A. Yes.

9 Q. Did there come a point in time where you became aware of  
10 the vacation freeze at the ERC?

11 A. Yes.

12 Q. When did that -- when did you become aware of that?

13 A. I became aware of that when I was approached to take a  
14 position in the ERC, but I actually knew prior to that  
15 because our department that I worked in previously had a  
16 close relationship with that department. So we already knew  
17 that there was a freeze.

18 Q. Okay. And to your understanding, what did that vacation  
19 freeze entail?

20 A. It entailed us not taking vacation during a certain  
21 point in time due to an increase in our work flow.

22 Q. Okay. Do you recall the period of time that was the  
23 sort of busy season at ERC?

24 A. The busy season was during the summer months.

25 Q. Okay. Were there any important life events that you had

1 to plan around the freeze?

2 A. I did. In 2017, I actually had to move a surgery back  
3 so that way it wouldn't interfere with our summer months  
4 because I knew they needed me. And then in 2018, I actually  
5 moved my wedding back so that way I would be there during the  
6 summer months of 2018.

7 Q. Can you describe what life was like in the ERC during  
8 those summer months?

9 A. Very hectic. The workload was a lot. We were needed a  
10 lot. It was a lot of new hires, transfers, terminations, and  
11 an abundance of other things that we had to do during the  
12 summer that was very time sensitive.

13 Q. And you said it was time sensitive. Can you describe  
14 why it was so important to get the work done?

15 A. It was very important because that would allow our  
16 teachers to be paid in time, our teachers to be paid  
17 properly. And if we had terminations during a summer, we had  
18 to make sure those were termed in a proper amount of time so  
19 that they would not receive pay.

20 Q. So if you were to take time off during that period --  
21 let me rephrase.

22 Could you take a large amount of time off, say 5,  
23 10, 12 days off during that period of time?

24 A. No.

25 Q. Okay. Why not?

1 A. It would be, you know, a hardship on the team, actually,  
2 just because we needed every person in their seats working  
3 constantly just to ensure that the work was completed in  
4 time.

5 Q. You said you actually became aware of the freeze even  
6 before you started at ERC?

7 A. Yes.

8 Q. But when you were with the ERC, how was that vacation  
9 freeze or leave blackout period -- how was that communicated  
10 to the staff?

11 A. From my recollection, it was sent out by email way in  
12 advance, and then we would have daily morning huddles, as you  
13 would call them, and our manager at the time would relay the  
14 day's work and what we had to do. So there was a freeze, but  
15 then there was a go time. So . . .

16 Q. Were you ever confused about when the freeze was on and  
17 when it wasn't?

18 A. No.

19 Q. Okay. Were you aware of anyone else at the ERC who was  
20 confused about the timing of the vacation freeze?

21 A. No, not that I'm aware.

22 Q. Can you think back to the summer of 2018. Did you or  
23 any of your co-workers, or even of your supervisors,  
24 Ms. Selina Harris or Ms. Lisa Few -- as a result of  
25 Ms. Barton not being in her position, were any of those

1 folks -- did they have to work extra?

2 A. I know Lisa Few and Selina Harris took on the majority  
3 of that workload. The rest of it was disbursed among the  
4 rest of us.

5 Q. And when you say that workload, you mean the work that  
6 would have been done by Ms. Barton?

7 A. Yes.

8 MR. PUCKETT: I don't have anything further.

9 CROSS-EXAMINATION

10 BY MS. COLLINS:

11 Q. Good afternoon, Ms. Hawkins.

12 A. Hi.

13 Q. When your deposition was taken, you thought that the  
14 vacation freeze was between April and the end of August;  
15 correct?

16 A. That was the time that was relayed to me during our  
17 deposition.

18 Q. What do you mean by that?

19 A. I believe you guys were the ones that told us that the  
20 time was from between April and August during our deposition.

21 Q. Okay. Would it help you to review your deposition just  
22 to make sure?

23 A. Sure. I do agree that it happened between April and  
24 August, roughly.

25 Q. And I have it turned to page 14 of your deposition. And



1 down on line 6 -- well, preceding that on page 13, the  
2 question was asked (as read): And what was your  
3 understanding? Did the dates change year to year? Answer:  
4 I don't recall the exact dates, so I can't say if they  
5 changed from year to year. From what I can recall, I know  
6 that the normal time that we could not take off was a certain  
7 month to a certain month.

8 Is that correct?

9 A. What line are you reading from? I'm so sorry.

10 Q. Sure. It was the bottom of page 13 to page 14, the top  
11 of page 14.

12 A. Like, line 25?

13 Q. Uh-huh.

14 A. Okay.

15 Q. Okay. Did I read that correctly?

16 A. You read it correctly.

17 Q. Okay. And the next question I asked was (as read):  
18 Okay. Do you recall those months?

19 And what was your answer on lines 7 through 8?

20 A. On line 8?

21 Q. Yes, lines 7 and 8.

22 A. (As read:) It was -- from what I can remember, it was  
23 between April and August.

24 Q. And then my next question was (as read): And when you  
25 say to August, would that be through the month of August or

1 up until the beginning of August?

2 And your response was, answer (as read): Again, I  
3 don't have the exact dates.

4 And my question was (as read): Sure.

5 That's not really a question. But your answer was  
6 (as read): From what I can remember, I believe it was  
7 through the end of August.

8 Did I read that accurately?

9 A. You read it.

10 Q. Okay. So does that help refresh your recollection that  
11 your testimony back on April 6, 2021, was that it was from  
12 April to the end of August?

13 A. I think I answered I believe it was to the end of  
14 August. That's not -- yeah. So I don't know for sure it was  
15 through the end of August.

16 Q. Okay. And you also testified that to code something as  
17 vacation time, you had to take off the whole or half day;  
18 right?

19 A. What I thought we had to do. I'm not certain.

20 Q. Okay.

21 A. I thought we had to do that, but it's been a long time  
22 ago, so I can't remember.

23 Q. Sure. Sure. But you do recall that if you were out  
24 sick during a freeze, you were allowed to use other paid  
25 leave and code it differently if you needed to?

1 A. Oh, yeah.

2 Q. Okay. And you were not required to have an  
3 accommodation to take extra time off during the freeze for a  
4 medical condition; correct?

5 A. No. I didn't need one. No.

6 Q. And if you needed time off during the freeze for a  
7 doctor's appointment, you could take it?

8 A. Yes.

9 Q. Okay. And just a moment ago, your attorney asked if --  
10 he asked you about if you couldn't take some time off during  
11 the freeze, and you mentioned a surgery. Was that an  
12 elective surgery?

13 A. No, it wasn't elective. No.

14 Q. Did you fill out FMLA paperwork for it?

15 A. I don't remember.

16 Q. Was the FMLA paperwork denied?

17 A. I don't remember if FMLA was involved. I can't  
18 remember.

19 Q. Did you ever go to your supervisor and discuss specifics  
20 as to potentially needing to take off for surgery during the  
21 summertime?

22 A. I believe I sent her an email. I believe. I can't  
23 remember.

24 Q. Okay. So you can't remember whether or not you  
25 discussed specifics with your supervisor?

1 A. When you say "specifics," what do you mean? I'm sorry.

2 Q. Like, "I'm going to need to take off from this day to  
3 this day. Would that be okay?"

4 A. I believe I probably put that in writing and sent it to  
5 my manager for approval.

6 Q. Okay.

7 A. I think.

8 Q. But sitting here today, you're just not sure?

9 A. I would think that I would have put that in writing. I  
10 feel like I did.

11 Q. Okay, but I'm asking you a little bit different  
12 question. Do you have a specific recollection that you  
13 engaged with your supervisor as to whether or not you could  
14 take very specific days off for surgery?

15 A. I don't recall if I had a specific conversation with my  
16 manager.

17 Q. Okay. Okay.

18 A. I just don't remember.

19 Q. And when you were talking about taking off a certain  
20 amount of days, did you ever request a religious  
21 accommodation when you worked for Metro Schools?

22 A. Have I ever asked for -- no.

23 Q. Okay.

24 MS. COLLINS: That's all I have. Thank you.

25 MR. PUCKETT: Very brief redirect, Your Honor.

## 1 REDIRECT EXAMINATION

2 BY MR. PUCKETT:

3 Q. Ms. Hawkins, do you still have your deposition in front  
4 of you?

5 A. I do.

6 Q. On page 14, would you do me a favor and read the lines  
7 starting at 16 to 19.

8 A. I believe this was a question. It says (as read):

9 Okay. And this is just to clarify. Was it the beginning of  
10 April or the end of April that it would start? Answer: I  
11 don't recall the exact dates. Question: Okay.

12 Q. That's okay. I just needed up to 19.

13 A. Oh, okay. Sorry.

14 MR. PUCKETT: Thank you. That's all I have.

15 MS. COLLINS: Actually, Your Honor, if I could  
16 just finish that excerpt.

## 17 RECROSS-EXAMINATION

18 BY MS. COLLINS:

19 Q. Where I said "Okay," and we established that wasn't  
20 technically a question, your answer was (as read): I just  
21 know it was between those months, but the exact dates are  
22 not -- I don't recall those exact dates.

23 Was that the rest of your testimony?

24 A. That's what's here, yes.

25 MS. COLLINS: Okay. Thank you.

1 THE COURT: Okay, ma'am, you can step down.

2 (Witness excused.)

3 MR. FOX: Your Honor, our next witness, we'd like  
4 to call Lisa Few back to the stand.

5 THE COURT: Okay.

6 COURTROOM DEPUTY: The Court reminds the witness  
7 you're still under oath.

8 THE WITNESS: Yes, ma'am.

9 LISA FEW,  
10 called as a witness, having been previously duly sworn, was  
11 examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. FOX:

14 Q. Ms. Few --

15 A. Yes.

16 Q. -- in your testimony yesterday, you talked about the  
17 work -- I believe you used the phrase ramped up, started  
18 ramping up in April?

19 A. Yes, it started ramping up in April because --  
20 basically, the end of school is end of May, as everybody  
21 knows. So in April, teachers, they start -- you know, if  
22 they want to transfer out of the school, then they start  
23 looking at other opportunities and talking to recruiters, and  
24 then we start getting paperwork in. So it all starts ramping  
25 up in April.

1           But then April -- you know, it just keeps ramping  
2 up. So April and then May and then June, boy, you're just  
3 really -- you're just really hit because everybody now is out  
4 of school, they've made up their mind, and here comes all the  
5 paperwork.

6 Q.   What's the difference between that work ramping up and  
7 the vacation freeze being put into place for the summer  
8 months?

9 A.   So the ramping up, like I said, you know, it starts in  
10 April. So we start seeing -- you know, seeing the workload  
11 increase in April. So we -- you know, we still allowed  
12 vacation time and covered for everybody during that ramp-up  
13 period, but when it got so busy and everything started coming  
14 into us in June, mid-June through the first week of school,  
15 which is the first week of August, that's when we had to put  
16 the vacation freeze in because we couldn't have anybody out  
17 of the office to -- because this work had to get done. So  
18 that was the difference.

19 Q.   Was that described to the ERC employees at the time?

20 A.   Yes.

21 Q.   All right. And then I want to -- I want to draw your  
22 attention to Plaintiff's Exhibit 19. Can you flip to what's  
23 been tabbed there as 19?

24 A.   Yes.

25 Q.   And what is that?

1 A. That is Metro's Responses to Plaintiff's First Set of  
2 Interrogations and Requests for Documents.

3 Q. Interrogatories?

4 A. Uh-huh, yes.

5 Q. And could you flip to -- let's see.

6 MS. COLLINS: Do we need -- it's being published  
7 to the jury.

8 THE COURT: Is this --

9 MR. FOX: If there's no --

10 THE COURT: Thank you.

11 MR. FOX: This is a stipulated exhibit,  
12 Plaintiff's Exhibit No. 19. If there's no objection now, I  
13 would like to tender this as --

14 THE COURT: Okay. Any objection?

15 MS. COLLINS: No.

16 THE COURT: All right. Exhibit 19 is admitted.  
17 You can publish it.

18 MR. FOX: Thank you for that, Your Honor.

19 (Plaintiff's Exhibit 19 received in evidence.)

20 BY MR. FOX:

21 Q. Okay, let's see here. 12, doesn't it here talk about in  
22 the response -- and this is Metro's response -- (as read):  
23 600-plus newly hired employees are onboarded successfully.  
24 An additional 800-plus employees are accurately transferred  
25 to new positions.



1 Am I reading that correctly?

2 A. Yes, that's correct.

3 Q. And then over on the next page (as read): The rush to  
4 staff school begins in April of each year with a rapid spike  
5 in volume between June and August.

6 Right?

7 A. That's correct.

8 Q. Am I reading that correctly?

9 A. Yes, that's correct.

10 Q. And then for No. 13, does it also talk about the ERC  
11 undergoes its peak hiring season beginning in mid-June?

12 A. That's correct.

13 Q. And what's the date on this that we sent that to  
14 opposing side, opposing counsel?

15 A. March 17, '21.

16 Q. So a year and a half ago; correct?

17 A. Yes.

18 Q. And that's consistent with what accurately took place on  
19 the ground in 2018?

20 A. That's correct.

21 Q. And as I, sorry, again, clumsily put this back together,  
22 let me ask you this: We heard testimony yesterday that the  
23 request for this religious convention came to your attention?

24 A. Yes.

25 Q. And you spoke to Ms. Barton about it?

1 A. Yes.

2 Q. All right. And was it clear at the time that she made  
3 the request -- did you understand that this was for a  
4 religious convention?

5 A. Yes, I did.

6 Q. Right. And based on the circumstances that were then  
7 present at the time, mid-June -- the dates of her request,  
8 June, July, was there any way that this could have been  
9 accommodated?

10 A. No, there was just no way. Like I said before, it  
11 was -- you know, I felt really bad that we couldn't let her  
12 go, but because of the hardship that it would put on all of  
13 the ERC staff, including myself and my supervisor, it just  
14 wasn't feasible.

15 Q. And that's you and Selina we've heard a lot about?

16 A. That's correct, Selina, uh-huh.

17 MR. FOX: That's all. Thank you.

18 MS. COLLINS: Your Honor, we don't have anything.

19 THE COURT: You can step down, ma'am.

20 MR. FOX: Your Honor, the last thing for  
21 defendant's proof -- so much of it came in yesterday really  
22 through plaintiff's case-in-chief, but is also the blue  
23 binder of exhibits. If there's no objection, I don't believe  
24 there is one because these were stipulated to, I'd like to  
25 tender these, what's been marked as Defendant's Exhibits 1, 2

1 and 3, into evidence.

2 THE COURT: All right, 1, 2 and 3.

3 MS. COLLINS: They have been stipulated to.

4 Exhibit No. 3 has not been published to the jury or shown to  
5 them. So I don't know really how that works.

6 THE COURT: Well, I mean, if there's no --

7 MS. COLLINS: Nobody's talked about it.

8 THE COURT: Right. Then I'm not sure what they  
9 can make of it if they don't know what it is, but is there  
10 any objection to the request that Defendant's Exhibits 1, 2  
11 and 3 be admitted into evidence?

12 MS. COLLINS: No objection.

13 THE COURT: Okay. Then those will be admitted.  
14 (Defendant's Exhibits 1, 2 and 3 received in  
15 evidence.)

16 MR. FOX: And, Your Honor, may I confer with my  
17 team for just a second?

18 THE COURT: Yes.

19 MR. FOX: Your Honor, the defense rests.

20 THE COURT: Okay. Let me have counsel approach,  
21 please.

22 (Bench conference outside the hearing of the  
23 jury:)

24 THE COURT: All right, a few things. One, do we  
25 expect any rebuttal proof?

1 MS. COLLINS: No.

2 THE COURT: Okay. So what I'm going to do is cut  
3 the jury loose for today and have them come back at 9:30  
4 tomorrow. My hope, given that it's only 1:15, we should be  
5 able to get our charge conference in today.

6 MS. COLLINS: Yes.

7 THE COURT: I'll give you plenty of time to look  
8 at the instructions before we get back together, but I think  
9 we can do that and get the charge in the can so that we can  
10 begin closings at 9:30 or so. I'm going to have them come in  
11 a little late. And then should be able to give it to them by  
12 lunch.

13 How long do you expect your closings are going to  
14 take on this?

15 MS. COLLINS: I mean, 20, 30 minutes, about like  
16 the opening.

17 THE COURT: About an hour in total for closings?

18 MR. FOX: Uh-huh.

19 THE COURT: We should be able to give this to them  
20 by lunch, and we may be able to get a verdict tomorrow. Then  
21 if not, we'll have to come back Monday.

22 I do have one question about this last exhibit  
23 that was admitted, these photos. There hasn't been anybody  
24 that's talked about them. Are they going to be -- I mean,  
25 how are those part of the case, I guess, photos that haven't

1 been shown to the jury, and somebody has testified what they  
2 are? I'm just a little concerned that they're photos that  
3 are given no context. I haven't looked at the photos. So --

4 MS. COLLINS: I mean, one option is, is I could  
5 bring Carol up to talk about them, but, I mean, I can --

6 THE COURT: I just don't want them to be used in a  
7 way that, in closings, for example, that -- we've already  
8 closed the proof. You know, there's nobody who can say,  
9 well, wait a minute, you know, because we haven't had any  
10 testimony about them to where there might be rebuttal or  
11 cross-examination or something like that. That's my concern.

12 MS. COLLINS: Yeah, I think that's -- I do have  
13 that concern. I think it would just make sense to have a  
14 rebuttal, call Carol up and ask her what they are. I can do  
15 that, or can I have a take-back? I already said I wasn't  
16 going to do rebuttal.

17 THE COURT: Part of it is, is I'm not sure what  
18 the evidentiary value of the photos are because nobody's  
19 talked about them. And usually it's very obvious, an email  
20 or something like that.

21 But your thoughts on these exhibits?

22 MR. FOX: Yes, Your Honor. I haven't thought all  
23 this through because they're stipulated to, they're  
24 stipulated exhibits, but --

25 THE COURT: Right.

1           MR. FOX: -- primarily it's to show that this was  
2 a religious convention, wasn't -- it wasn't, say, by contrast  
3 that, you know, a mission trip to Haiti to dig wells or  
4 something like that. I just wanted to dispel that notion,  
5 that this was a religious convention. And so that we're  
6 trying to say -- that's spelled out in the photos so that  
7 this is not something that the employer is obligated to  
8 accommodate under federal law.

9           THE COURT: A conference. You're drawing a  
10 distinction between a conference versus mission work?

11           MR. FOX: She used the word "convention," and the  
12 wording on the documentation itself says "convention." So --

13           THE COURT: I don't think I've got a copy of your  
14 exhibits up here, otherwise, I would have looked at them. Go  
15 grab a copy and let me take a look at what we're talking  
16 about. Is this five photographs?

17           MS. COLLINS: I mean, it's kind of confusing  
18 because the first one is --

19           THE COURT: Looks like a conference to me. I  
20 mean, I guess my concern -- was there some argument at some  
21 point in the case that this was just a big party, and it  
22 wasn't really a legitimate religious convention? I mean, is  
23 that still going to be presented to the jury, that this  
24 wasn't a legitimate convention, conference, gathering for  
25 religious purposes, whatever label we want to put on it? Do

1 you see what I'm -- because looking at the photos and if  
2 somebody is going to argue them, I'm going to tell them your  
3 argument is not evidence, but there's no real context for an  
4 exhibit that's in that -- I want to just be careful about  
5 that because evidence that comes in is at least talked about.  
6 So that's the reason I wanted to do this before we let them  
7 go in case there's something we need to do with that before  
8 we kick them out of the building for the day.

9 MR. FOX: Yeah, I mean, it's part of our  
10 defendant's theory that -- we're not trying to debate the  
11 pillars of her faith or anything like that, but, however,  
12 there was a large social aspect to this trip around the --  
13 halfway around the world as well.

14 THE COURT: Which I think they've testified to  
15 that.

16 MR. FOX: Yeah. Well, these pictures speak a  
17 thousand words, a thousand witnesses I didn't have to put on  
18 because --

19 THE COURT: Right.

20 MR. FOX: Yeah.

21 MS. COLLINS: That being the case, we do need to  
22 call her as a rebuttal.

23 THE COURT: Okay. Let's do that so that -- and  
24 you can question her about it.

25 MR. FOX: Okay.

1 THE COURT: I just was hesitant to have exhibits  
2 thrown in front of the jury that nobody has talked about, and  
3 they won't know what to make of that. So let's do that.

4 (Bench conference concluded.)

5 THE COURT: All right. Ms. Collins, I guess you  
6 want to have a brief -- put on brief rebuttal proof to the  
7 defendant's evidence?

8 MS. COLLINS: Yes, Your Honor. We're going to  
9 recall Ms. Barton to the stand.

10 COURTROOM DEPUTY: The Court reminds the witness  
11 you're still under oath.

12 THE WITNESS: Yes, ma'am.

13 CAROL BARTON,  
14 called as a witness, having been previously duly sworn, was  
15 examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MS. COLLINS:

18 Q. Hi again, Carol. If you could turn to tab No. 3 in the  
19 defendant's exhibit binder. Now, I'm just going to go  
20 through these starting with the first page.

21 A. Okay.

22 Q. Okay. Carol, can you tell me what this is?

23 A. Yes, this was a photo I extracted from one of our fellow  
24 members and posted it. If you recall -- some may, some may  
25 not -- in April of 2019, there was a bombing there. And one



1 of them happened to be the hotel we stayed at when we were  
2 there for our convention, and it mentioned three churches. A  
3 lot of times in the news, they say churches. They don't say  
4 Kingdom Halls. So my mind and heart was with our brothers  
5 and sisters there in Sri Lanka, and that's why this picture  
6 was posted.

7 Q. Okay. And the date on that picture, was that when you  
8 posted that?

9 A. Uh-huh.

10 Q. Was that right around the time of that bombing?

11 A. Uh-huh.

12 Q. Okay. And this other picture?

13 A. This is a fellow sister in the faith. She was from  
14 Korea. And this was during the intermission time when we  
15 were doing our fellowship, and I just took a picture with  
16 her.

17 Q. Okay. And when you say "intermission time," between  
18 what?

19 A. Between our sessions. You go to the bathroom. You eat  
20 lunch. And this was during a break period.

21 Q. Okay. And those are the sessions that you were  
22 describing yesterday that consisted of --

23 A. It was an all-day session that we were there. And, of  
24 course, like we took a break here at lunchtime, we had a  
25 break then as well.

1 Q. Well, what did -- but the sessions in particular, what  
2 did those consist of?

3 A. Faith-based Bible lectures, interviews from different  
4 delegates. We had speakers worldwide from different Bethel  
5 locations. And as been mentioned, it was an interchange of  
6 encouragement, Bible information that encouraged us, and we  
7 were able to bring back and share with our congregation.

8 Q. Okay. And then the next picture?

9 A. The next picture, this is us in the lobby. The night  
10 before we were leaving as an end, they had a special dinner  
11 for us. And that's some of the -- that's my sister-in-law  
12 and one of the brothers that was there.

13 Q. Okay.

14 A. And it's just a memory picture like anybody else would  
15 take at an event.

16 Q. Okay. Is that you right there in the middle?

17 A. Uh-huh.

18 Q. Okay. And this picture?

19 A. And the last one, these were some of the brothers and  
20 sisters that put on a show for us that evening. Of course,  
21 going to another country, you're going to learn about their  
22 culture. They talked about how Jehovah's Witnesses were  
23 started there, and there was a lot of interviews from  
24 different people. Again, this is part of the interchange of  
25 encouragement. Just like anybody, you go to special temples

1 and whatnot, you learn about cultures there, this is what  
2 this was. This was the last night before we were leaving.

3 Q. Okay. And the next one?

4 A. As it states here, it's an elevator selfie, all of us in  
5 the elevator, and the young man in the front, he was taking a  
6 picture of us.

7 Q. Okay. And that's you right there?

8 A. Uh-huh, that's me in the back.

9 Q. So even though this was a religious convention, and  
10 you-all were all there for a very specific purpose, you still  
11 had a good time; right?

12 A. We enjoyed the fellowship, building up and encouraging  
13 one another.

14 Q. And you've done many other things throughout the course  
15 of your faith journey where you also had a good time?

16 A. Yes. I've been able to go on other -- not necessarily  
17 like that one in Sri Lanka, but in my faith, I've got to do a  
18 lot of different things. I've helped with our disaster work  
19 in different places around the United States and whatnot. So  
20 being an active Jehovah's Witness, you get to participate in  
21 doing a lot of events. Every now and then, like this  
22 particular one, this was a special event, and I was happy to  
23 be selected to be a part of it, a once in a lifetime event.

24 And another thing I want to say about this here,  
25 this was the first time ever a convention was held in

1 Sri Lanka. So that was another big deal, too, about it.

2 Q. Okay.

3 MS. COLLINS: All right. Thank you, Carol.

4 MR. FOX: No further questions. Thank you.

5 THE COURT: You can step down, ma'am.

6 (Witness excused.)

7 THE COURT: All right, members of the jury, you've  
8 now heard all the proof in the case. Just to forecast the  
9 rest of the trial, as I mentioned earlier today, trials can  
10 go in fits and starts. This one has moved at a very fast  
11 pace, and we've still got some other things to do before we  
12 wrap the trial up with you. So we're going to take the  
13 afternoon and do that and let you go for the day.

14 You really should get a head start on our traffic  
15 today if we get you out of here at 1:30, at least I hope.  
16 We're going to have you come back at 9:30 tomorrow, instead  
17 of nine. We're going to start a little bit later. And I  
18 expect what will happen is we'll hear the closing arguments  
19 from counsel, and then I will give you your instructions, and  
20 then you'll begin your deliberations hopefully by around  
21 lunchtime.

22 I know we told you on the first day four to  
23 five days, and that was a good guess, but it's moved faster  
24 than that. So you will be allowed to then talk about the  
25 case and be encouraged to talk about the case with each other

1 during your deliberations. Not there yet, so I still have to  
2 give you this standard instruction that you're already tired  
3 of hearing after just a day and a half, which is please don't  
4 talk about the case with each other or anyone else, do any  
5 independent research about any matters touching on this case,  
6 until you start deliberating tomorrow, and then you'll have  
7 the evidence, and you'll have each other to talk to, and  
8 you'll begin your deliberation, but until then, just please  
9 put it out of your mind.

10 Appreciate your flexibility. And we'll get you on  
11 out of here and let you enjoy the rest of the nice day. Have  
12 a good evening.

13 (The jury was excused from the courtroom at  
14 1:29 p.m.)

15 THE COURT: All right, be seated, please.

16 Have you-all found places just to camp out in the  
17 building here and all that? Have you-all divided up our  
18 witness rooms evenly and all that?

19 MR. FOX: Yes.

20 THE COURT: Okay. If you could just hang out  
21 either in here or back there, when we have the jury charge  
22 draft ready, we will bring you a copy. And then just let us  
23 know when you think you're ready to do the charge conference.  
24 Again, I've got to stop at about 4:00. I'm hopeful that we  
25 can get through it all by then, but I want to make sure

1 you-all have plenty of time to take a look at what the  
2 current draft looks like, and then we'll have our conference  
3 if you're ready and then get that put to bed so that you can,  
4 if you choose, use the verdict form and the jury instructions  
5 as you prepare your closing arguments. So . . .

6 Just hang tight and I'll get either Angie or  
7 Eileen to bring you a draft, and then I'll be back there  
8 waiting for you to tell me when you're ready to do the charge  
9 conference. Okay?

10 (Recess taken from 1:31 to 3:00 p.m.)

11 THE COURT: All right, we've given out a -- we  
12 neglected to give you a copy of the verdict form earlier.  
13 It's fairly short and sweet, but I'll give you a minute to  
14 take a look at that. But I did want to go ahead and try to  
15 get through any issues with the jury charge this afternoon.

16 Let's start with the charge, and I'm just going to  
17 go by some headings, and I'm going to start turning pages  
18 until you tell me to stop.

19 So the Introduction and Jurors' Duties, any issues  
20 from the plaintiff on those two sections?

21 MS. COLLINS: No.

22 THE COURT: Anything from the --

23 MR. FOX: Nothing from the defense.

24 THE COURT: All right. Then we get to Burden of  
25 Proof. Anything on that section from the plaintiff.

1 MS. COLLINS: No.

2 THE COURT: And the defendant?

3 MR. FOX: Nothing from the defendant.

4 THE COURT: Okay. Now, Substantive Law begins

5 with an introductory -- we'll just take this in subparts

6 because there's likely to be a little more to talk about.

7 That first paragraph on page 4 of the current draft begins

8 with "In this case" down to before the first subheading.

9 Any changes or issues with that section from the  
10 plaintiff?

11 MS. COLLINS: No.

12 THE COURT: Defendant?

13 MR. FOX: Well, Your Honor, I need to back up a  
14 page to the bottom of page 3. The last paragraph at the

15 bottom says "Ms. Barton claims that Metro discriminated

16 against her because of her religion, comma, refused to

17 accommodate her religious observation, comma, and retaliated

18 against her in violation of Title VII."

19 So we take issue with there being three individual

20 claims in this case. We briefed this in summary judgment,

21 and Your Honor landed with a memorandum opinion that

22 identified two claims, failure to accommodate and

23 retaliation. And this is specifically addressed -- the fact

24 that the religious discrimination claim was not in this case

25 was specifically briefed, and Your Honor didn't address that

1 issue head on, but you decided in your memorandum opinion in  
2 March of this year that this case was about really just  
3 accommodation and retaliation. And it's nowhere to be found  
4 in their amended complaint any kind of disparate treatment,  
5 discrimination.

6           That's the only other theory we could think of  
7 that this might be, Your Honor, for religious discrimination,  
8 would be some type of disparate treatment, but there's no  
9 facts alleged that she was -- that there were these other  
10 comparators who were outside the protected class and that who  
11 were treated more favorably than she was. There's no  
12 allegation of that. So we've been traveling along now for a  
13 couple of years without thinking we're going to have to look  
14 at comparators and really defend some people being treated  
15 perhaps more favorably than she, so would go the allegation.

16           And then also legitimate nondiscriminatory reason  
17 comes into play and also pretext. And that's getting a  
18 little far ahead, but those instructions would need to be  
19 there too.

20           THE COURT: Yeah, but the Sixth Circuit has  
21 clearly said the burden shifting process is for summary  
22 judgment purposes and not for trial. We don't ask the jury  
23 to do that back and forth because the ultimate issue is -- I  
24 mean, there it's have they presented -- is there sufficient  
25 evidence, are there undisputed facts such that the claim



1 fails, or whatever the argument may be on summary judgment --  
2 and we'll have to pull the case.

3 MR. FOX: Well, just any discrimination case I've  
4 ever been involved in where there's jury instructions, we  
5 always have a section about -- some instruction about  
6 legitimate nondiscriminatory reason --

7 THE COURT: Oh, I'm not saying -- I'm not saying  
8 that there's not an instruction on it. What I'm saying is  
9 it's not as clean of a back and forth --

10 MR. FOX: That's right.

11 THE COURT: -- thought process as you would have  
12 at summary judgment.

13 MR. FOX: That's right. And I agree with that.  
14 And partly it's because the plaintiff has to put on their  
15 proof first --

16 THE COURT: Right.

17 MR. FOX: -- and then the defense goes second, so  
18 we don't have . . .

19 THE COURT: Right. All right, let me just get to  
20 the -- the most recent complaint, which I believe is the one  
21 that was filed on April the 10th of 2020, Count One is  
22 Violation of Title VII - Religious Discrimination, comma,  
23 Failure to Accommodate.

24 MR. FOX: I'm sorry, what date did you say,  
25 Your Honor?

1           THE COURT: April the 10th. Is that the most  
2 recent complaint?

3           MR. FOX: Of '21?

4           MS. COLLINS: It's ECF 14.

5           THE COURT: 19.

6           MS. COLLINS: Is it 19?

7           MR. FOX: I have 14. March 13, 2020, ECF 14.

8           THE COURT: What's Docket No. 19 on CM/ECF?

9           MR. FOX: I don't have all the Pacer in front of  
10 me, Your Honor. I'm sorry.

11           THE COURT: Angie, can you pull that up? Because  
12 I looked at this over lunch when we were dealing with the  
13 Rule 50 motion to make sure I was looking at the right  
14 operative complaint, and the one that I found was Docket  
15 Entry 19, which was actually filed before the date you just  
16 listed. So it's particularly confusing.

17           MS. COLLINS: Yeah, that's -- looks like we  
18 amended it a couple of times. But, yeah, that was the last  
19 one.

20           THE COURT: I mean, it does kind of strain --  
21 takes a bit of a strain reading -- you might have put the  
22 heading on there, Religious Discrimination, but the  
23 allegations themselves point to accommodation.

24           MS. COLLINS: Well, this was also raised in our  
25 opposition for summary judgment, that Metro failed to analyze

1 or argue that the discrimination claim should be dismissed.

2 MR. FOX: Right, and in the Judge's -- in  
3 Your Honor's memorandum of March of this year, it was just a  
4 memorandum about failure to accommodate and retaliation,  
5 period.

6 THE COURT: But was I asked to -- well, I don't  
7 have your briefings in front of me. I have the order. Is it  
8 fair to say that the argument from Metro at summary judgment  
9 was "We understand the claims to be two, accommodation,  
10 retaliation," and then was the argument in response to that,  
11 "Oh, but there's another"?

12 MS. COLLINS: Yes.

13 THE COURT: Okay. So there was a -- because the  
14 pretrial order -- let's go back to that because that  
15 supplants the pleadings. So was discriminated and retaliated  
16 against.

17 MR. FOX: Failure to accommodate is a form of  
18 discrimination.

19 THE COURT: Right. But is the theory something  
20 distinct from that, Ms. Collins, or is the discrimination  
21 based on the failure to accommodate alone, or is there some  
22 other theory that you're riding there?

23 MS. COLLINS: No, it's both. In the plaintiff's  
24 statement of the issues, we had whether Metro discriminated  
25 against and failed to accommodate Barton's religion and

1 retaliated against her in violation of Title VII.

2 THE COURT: Right.

3 MS. COLLINS: And then whether she could prove  
4 damages. So it's the liability on those three things and the  
5 damages portion. Did that answer your question?

6 THE COURT: It does.

7 MR. FOX: But it's two numbers. One is  
8 discrimination in the form of failure to accommodate. Two --

9 THE COURT: And retaliation.

10 MR. FOX: Oh, and retaliation, yeah. I mean, they  
11 can't invent a claim out of the pretrial order.

12 THE COURT: No.

13 MR. FOX: It's to preserve what they've already  
14 alleged.

15 THE COURT: Right, but, I mean, I think -- I mean,  
16 there's certainly a heading in the operative complaint titled  
17 Religious Discrimination, comma, Failure to Accommodate. I  
18 don't know if that means the failure to accommodate is  
19 putting a finer point on it, or if those are distinct  
20 theories. But that's just a heading. The paragraphs  
21 underneath it, the first -- paragraph 17 talks about a  
22 request for accommodation; paragraph 18 talks about refusal  
23 to accommodate; 19 talks about accommodation twice; 20 is  
24 aimed, I guess, at the undue hardship defense; 21 is  
25 accommodate; and then 22 is just your causation paragraph.

1           Where could one find in those allegations a  
2 discrimination based on religion claim that's distinct  
3 from -- I'm not saying the acts underlying it have to be  
4 distinct. We dealt with that a few hours ago. But where  
5 could one reasonably conclude and be put on notice that  
6 there's this other claim baked into that, that is distinct  
7 from accommodation? And at the end of the day, practically,  
8 is that really what you've put on proof to prove, or is it  
9 more the accommodation claim?

10           MS. COLLINS: Well, I think practically speaking  
11 it's more about the accommodation claim. I think technically  
12 speaking it's two different things. And so --

13           THE COURT: But what's the proof we've got of  
14 discrimination that's distinct from the accommodation claim?  
15 Because we got to charge the jury on -- they have to have  
16 something in the record from which to conclude that you  
17 either win or you lose. I mean, this reminds me a little bit  
18 of a pretrial conference I had a long time ago with  
19 Judge Higgins right before he left the bench.

20           Did you ever have much with Judge Higgins?

21           MR. FOX: No, I did not.

22           THE COURT: Did you?

23           MS. COLLINS: No, but I've heard about him.

24           THE COURT: I had very few things. I won't say  
25 that I'm that old because you-all know I'm not, at least I

1 hope you think I'm not. But we had a multi-count complaint,  
2 and, you know, he fussed at the lawyers, but he liked to fuss  
3 at lawyers, and, you know, he made the comment, look, at some  
4 point you just have to convince the jury why you win and why  
5 the other side doesn't win, depending on which side of it it  
6 is, and you can really do yourself a disservice by clouding  
7 too many things in there that the jury can't really grab  
8 ahold of what it is you're asking them to do.

9           It's your case. That didn't necessarily stop me  
10 from doing it going forward when I was practicing law because  
11 you're risk adverse, and you don't know what claims are going  
12 to really have the most merit when you actually get to trial,  
13 but, I mean, do we need -- I guess the ultimate question is  
14 do we need a separate instruction and also a separate  
15 question on the verdict form of just discrimination when it  
16 seems to me that the meat of the case is an accommodation  
17 claim, at least as to the proof that I heard?

18           MS. COLLINS: I think that the answer to that may  
19 be -- from a legal perspective, now that I think about it,  
20 might be no, as much as I hate to admit it. Kind of seems  
21 like I was reading a case the other night that said you can't  
22 have a separate accommodation and discrimination claim.  
23 So -- because it's folded into the same thing.

24           THE COURT: You mean if -- like I can understand a  
25 situation -- and it's not the facts of this case, so don't

1 hear that. I'm just thinking in terms of hypothetically --  
2 where somebody says "I need to be accommodated" -- let's just  
3 take it out of the religious thing, and let's use ADA because  
4 that's a fairly close parallel. "I need an accommodation  
5 for" -- let's say it's a case where the person needed an  
6 accommodation to be able to sit a certain part of the time  
7 while he did his job in a factory, okay. And they said,  
8 "Absolutely not, can't accommodate you."

9           Then after that, every time somebody went by them,  
10 they did something that was aimed at that disability. There  
11 was continuing separate conduct that was more discriminatory  
12 in nature. They had already made the decision on the  
13 accommodation. It's more discriminatory in nature. You  
14 know, "How you holding up there," you know, whatever nickname  
15 they may give him, whatever it is. Then I can see that those  
16 two theories could be pulled apart and be separate.

17           Does that make sense?

18           MS. COLLINS: Yes.

19           THE COURT: You know, whereas here, I think the  
20 operative events, at least as I understand the proof, is -- I  
21 mean, there's operative events and then there's the result of  
22 those events in terms of employment actions, but as I  
23 understand it is several conversations about the requested  
24 leave for the stated reason that Ms. Barton gave of attending  
25 this conference in Sri Lanka and the denial of that leave.

1 Now, there's some other things in there too, I'm not  
2 oversimplifying it, but the theory in terms of the  
3 distinction between retaliation and discrimination -- not  
4 retaliation, accommodation and discrimination seem to kind of  
5 merge there.

6           And I'm not sure the complaint really fleshes out  
7 much of a meaningful difference, either in Count Two or in  
8 the factual basis, which was a pretty simple -- it all  
9 relates to her attending this and -- well, I mean, it even  
10 says there's an allegation -- I don't know how much of this  
11 is part of your trial theory, Ms. Collins, but there's an  
12 allegation of discriminatory policy does not examine requests  
13 for religious accommodation on a case by case basis, but  
14 rather one that is limited to two days. That's as far as I  
15 can -- that's about the best I can find in this complaint  
16 that would distinguish it from accommodation, but . . .

17           MR. FOX: That would be a disparate impact claim,  
18 perhaps.

19           THE COURT: Right.

20           MR. FOX: Which requires statistical analysis.

21           THE COURT: Right. And it's not a  
22 discrimination -- just straight up traditional  
23 discrimination.

24           But back to the jury instructions, which I think  
25 is what started the concern legitimately that we're



1 instructing the jury on a claim that Metro contends is really  
2 not in the case.

3 MS. COLLINS: I mean, I thought it was pretty  
4 clear in the pretrial order that it was in this, and I  
5 thought that's what we were litigating all along. And that  
6 was, in fact, acknowledged when defendant submitted a  
7 separate statement of the issues that acknowledged that there  
8 was -- you know, they contended that there was not a  
9 disparate treatment, religious discrimination claim. And so  
10 that, to me, was an acknowledgement that there were three  
11 claims, they understood that we asserted there are three  
12 claims. We've asserted there are three claims from the  
13 summary judgment briefing to this point.

14 The problem I see with just relying on the  
15 accommodation claim in and of itself is that the  
16 accommodation claim involves that undue hardship element that  
17 is not present in a traditional discrimination analysis. So  
18 I think that, while the easy answer would seem to be let's  
19 eliminate the discrimination claim and just stick with the  
20 accommodation claim, it's a viable claim. It was viably  
21 pled. They didn't move to dismiss it. They didn't move for  
22 clarification as to what it was. It was addressed at summary  
23 judgment briefing. It was ignored at summary judgment  
24 briefing. And they acknowledge that we're still contending  
25 that at this stage. So I don't really know like where to

1 fall on that because they are two very different analyses.

2 THE COURT: What was Ms. Barton asked about her  
3 claims in her deposition?

4 MR. FOX: I didn't depose her.

5 THE COURT: Oh, did not depose her. Okay. That  
6 might have been one place to clear it up.

7 MR. FOX: There's no clarification, Your Honor.  
8 The EEOC charge doesn't say anything about disparate  
9 treatment. The complaint, as you just went through,  
10 Your Honor, talks about failure to accommodate only. The  
11 fact that they -- if there's any disparate treatment there at  
12 all, it would have been subject to a *Twombly* motion. There's  
13 just no disparate treatment there.

14 And then any time they tried to raise it -- when  
15 they tried to raise it in response to our summary judgment,  
16 we addressed it there. And they tried to raise it in this  
17 pretrial order, and we've addressed it here. It's just never  
18 been a part of this case, otherwise, we would have put proof  
19 on differently and maybe engaged in discovery a little bit  
20 differently about similarly situated comparators and who was  
21 treated less favorably or more favorably, what evidence there  
22 was of pretext and that kind of thing.

23 MS. COLLINS: Well, I mean, I believe it's  
24 splitting hairs. I mean, her EEOC charge, which was drafted  
25 by the EEOC, says "I believe I've been discriminated against

1 because of my religion in violation of Title VII," period.

2 So . . .

3 THE COURT: Right, but I think his point is how is  
4 the discrimination -- is the violation of Title VII a failure  
5 to accommodate theory or a discrimination theory?

6 MS. COLLINS: Well, I think it's both, but now I'm  
7 confused.

8 THE COURT: Well, we have a 2015 Supreme Court  
9 case that acknowledges, at least in theory, a disparate  
10 impact claim can be based on a failure to accommodate, but I  
11 don't have that case in front of me, and I'm not sure if that  
12 was the theory or whether the Court was asked to decide  
13 whether you could have both theories.

14 MS. COLLINS: *Abercrombie? EEOC versus*  
15 *Abercrombie?*

16 THE COURT: Is that the *Abercrombie*? Yeah, then  
17 maybe I do have that.

18 MR. FOX: You said disparate impact. Do you mean  
19 disparate treatment?

20 THE COURT: Yes, that's what I meant. Yeah.  
21 Yeah, this is not an impact case, right. I mean, there's a  
22 fair point raised that -- I mean, I realize at summary  
23 judgment the issue was raised by the plaintiff, and then I  
24 guess in some way your reply addressed it?

25 MR. FOX: Yes.

1 THE COURT: And we just didn't address it at all  
2 in the order?

3 MR. FOX: Right, only just by having two headings.

4 THE COURT: Right, but didn't --

5 MR. FOX: Take it on head on.

6 THE COURT: -- take on whether or not there is  
7 that claim --

8 MR. FOX: Right.

9 THE COURT: -- and if so, whether it survives and  
10 all that. Because I guess it wasn't the subject of the  
11 original motion. It came up in subsequent briefing on that  
12 motion, so we were probably a little bit focused on what  
13 relief that the motion seeks, as opposed to what's brought up  
14 later.

15 What is the religious discrimination -- what proof  
16 in this trial could the jury use to conclude that there was  
17 religious discrimination different from the proof that would  
18 prove the reasonable accommodation?

19 MS. COLLINS: Because if they had the policy that  
20 said -- I mean, it's -- like *Abercrombie*, they had the policy  
21 that said you can have two days, two paid days. That was  
22 somewhat conflated into meaning two days, not just two paid  
23 days. And so by them having this policy that they conflated  
24 into two days, they --

25 THE COURT: Are you talking about the handbook

1 part where it talks about religious days?

2 MS. COLLINS: Yeah, uh-huh.

3 THE COURT: But I don't think that's why they  
4 denied her leave, was it was religious days.

5 MS. COLLINS: But they had granted it in the past  
6 when it was just two days. They had said in the past, if  
7 it's just two days, then that's okay. There was testimony at  
8 trial that in June she had gone off to her regional  
9 conventions, her summer conventions, that were not  
10 international conventions and longer because -- in part,  
11 because there was this policy in place that paid for -- that  
12 allowed for two paid religious holidays. And so that  
13 testimony was in evidence. They allowed it previously. And  
14 then when she asked for more time, it's just no, shut the  
15 door.

16 And so I think it's a lot like the policy in  
17 *Abercrombie*, which involved, if I'm not mistaken, a head  
18 scarf. And they said that, you know, she couldn't wear the  
19 head scarf at work, but it had the effect of discriminating  
20 against someone. So the Court in that case said that it  
21 wasn't a disparate impact situation, even though it was a  
22 policy, but it had an individual effect. And so in this  
23 case, I think that there was this policy, which we touched on  
24 a little bit, which allowed her to take the vacation in prior  
25 years, even during the summertime, even during the freeze,

1 and so that would amount to discrimination, just religious  
2 discrimination, separate and apart from -- separate and apart  
3 from the accommodation. That's -- just reading *Abercrombie*,  
4 I think that . . .

5 THE COURT: Well, I think -- I mean, the parts  
6 that I've looked at, particularly *Abercrombie* --

7 MS. COLLINS: I was on page -- I'm sorry. I was  
8 on page -- well --

9 THE COURT: I'm at the very end of the majority  
10 opinion. It was written by Justice Scalia.

11 MS. COLLINS: Yes.

12 THE COURT: It looks like the arguments presented  
13 were -- says (as read): *Abercrombie* argues in the  
14 alternative that a claim based on a failure to accommodate an  
15 applicant's religious practice must be raised as a disparate  
16 impact claim, not a disparate treatment, we think not.

17 So I think they were trying to get -- the Court  
18 was trying to get its head around which form of  
19 discrimination does this fall under. Is it disparate impact  
20 or disparate treatment. And then at the very end, he says  
21 (as read): Title VII requires otherwise neutral policies to  
22 give way to the need for an accommodation.

23 I think this was a neutral policy that they were  
24 trying to enforce. But you're asserting a disparate  
25 treatment claim; correct?

1 MS. COLLINS: Yes.

2 THE COURT: Okay.

3 MS. COLLINS: Disparate treatment, failure to  
4 accommodate and retaliation. Three.

5 THE COURT: All right, let me come back to that  
6 because we've got other instructions I want to get through,  
7 and we're getting shorter on time.

8 All right, let's go to the Religious Accommodation  
9 instruction. For the plaintiff?

10 MS. COLLINS: Oh, were you asking me?

11 THE COURT: Uh-huh.

12 MS. COLLINS: For the Religious Accommodation, the  
13 only concerns that I had was subparagraph 2, where it says  
14 Ms. Barton informed Metro about the conflict. I'm not sure  
15 that pursuant to *Abercrombie* that she has to have informed  
16 them. If they knew about it generally, then that satisfies  
17 the inquiry.

18 THE COURT: Is there any dispute on this element?

19 MR. FOX: No, I don't believe so.

20 THE COURT: I mean, what if it said "Metro was  
21 aware of the conflict"? It doesn't matter whether she told  
22 them, or they knew for some other reason. I mean, I don't  
23 think there's a dispute in the proof that they had no idea  
24 what she was wanting these days off for. I think it was  
25 pretty clear to them what she wanted the days off for; right?

1 MS. COLLINS: Yeah.

2 THE COURT: So can we just modify that element  
3 that we're asking the jury to decide to just say "Metro was  
4 aware of the conflict"?

5 MS. COLLINS: Yes, that makes sense.

6 THE COURT: Is that okay with you, Mr. Fox?

7 MR. FOX: Yes, Your Honor.

8 THE COURT: All right.

9 MS. COLLINS: And then in 3, element 3,  
10 Ms. Barton -- I think it would be more accurate to say "was  
11 subjected to an adverse action for failing to comply with the  
12 conflicting employment requirement."

13 MR. FOX: No, Your Honor. That *Reed* case from the  
14 Sixth Circuit is very clear.

15 THE COURT: All right.

16 MS. COLLINS: The what case?

17 MR. FOX: *Reed*, R-E-E-D.

18 MS. COLLINS: Clear about what?

19 MR. FOX: That part of a prima facie case is to  
20 show that the employer discharged the employee or  
21 disciplined, that there was no proof of discipline. I mean,  
22 theory, there's no theory of discipline.

23 MS. COLLINS: I think pursuant to the case law  
24 that the Court cited at the judgment as a matter of law then  
25 that is prevailing authority. What is the cite on *Reed*?



1 THE COURT: You're talking about the *Deleon* case I  
2 cited earlier?

3 MS. COLLINS: Uh-huh. Yes, Your Honor.

4 THE COURT: Let me try to find that. Hold on.  
5 *Reed* was when, what year?

6 MR. FOX: 2009.

7 THE COURT: I think *Deleon* was -- here it is.

8 MS. COLLINS: 2009, that predated *Burlington*  
9 *Northern*, which clarified, and it gave an expanded definition  
10 of what an adverse employment action was.

11 MR. FOX: We're not talking about retaliation  
12 here. This is discrimination.

13 MS. COLLINS: Well, it --

14 THE COURT: This is accommodation.

15 MS. COLLINS: No, but it dealt with what an  
16 adverse action is. And that's what that is -- that's what  
17 you're saying, where it has "Ms. Barton was discharged."

18 MR. FOX: I think *Burlington Northern* was 2008,  
19 anyway. I don't think that was --

20 THE COURT: Well, we've got *Deleon v Kalamazoo*  
21 *County*, 2014, Sixth Circuit, and they do cite the *Burlington*  
22 *Northern* case.

23 MS. COLLINS: What was the full cite on *Reed*?

24 THE COURT: It's 569 F.3d 576.

25 In *Deleon*, they talk about the *Burlington Northern*

1 opinion, and they say -- this is 930 -- I'm sorry, 739 F.3d  
2 914, 2014 case out of the Sixth Circuit.

3 MS. COLLINS: I'm sorry, I didn't -- what was the  
4 Reed cite again?

5 MR. FOX: 569 F.3d 576.

6 MS. COLLINS: Okay.

7 MR. FOX: 2009.

8 THE COURT: I mean, I'm not sure that this -- as  
9 we drafted it, now that I look at it, that discharge is the  
10 correct term. In *Deleon*, the Supreme Court addressed the  
11 issue at length in *Burlington Northern*. (As read:) As in  
12 the instant case, the matter involved a transfer from one  
13 employment unit to another without a change of salary, title  
14 or work hours. The Court held -- this is quoting *Burlington*  
15 *Northern* -- held that, quote, whether a particular  
16 reassignment is materially adverse depends on the  
17 circumstances of the particular case and should be judged  
18 from the perspective of a reasonable person in the  
19 plaintiff's position considering all the circumstances,  
20 closed quote. We have held that a transfer may classify as  
21 an adverse employment action where it constitutes a  
22 constructive discharge.

23 Which isn't the case here.

24 (As read:) In order for an employee to be  
25 constructively discharged, the working conditions must be

1 objectively intolerable to a reasonable person.

2           Again, I don't understand the facts would support  
3 that here.

4           Then it says (as read): Even still, our circuit  
5 has not foreclosed the possibility that a transfer not rising  
6 to the level of constructive discharge might, nonetheless,  
7 constitute a tangible employment action.

8           And it says (as read): At a minimum, the employee  
9 must be able to show a quantitative or qualitative change in  
10 the terms and conditions of employment.

11           So I don't know that we have to go all the way to  
12 the word "discharge" there.

13           MR. FOX: Your Honor, and that's a failure to  
14 accommodate case? Because religious failure to accommodate  
15 is very specific --

16           THE COURT: No, I understand. This was an ADEA  
17 case and a Title VII case. Let me see what the Title VII  
18 claim was. Yeah, says (as read): Earlier in that case,  
19 generally, discrimination claims under Title VII and the ADEA  
20 are analyzed using the same framework.

21           This was -- he was reassigned to a different  
22 position, and then it was apparently a much more difficult  
23 physically demanding position. He brings claims for race  
24 discrimination, Hispanic male, national origin, and age. You  
25 also have an equal protection claim, which --

1           MR. FOX: Obviously, the Sixth Circuit has etched  
2 out a separate area of law for religious failure to  
3 accommodate, and that's what that *Reed* case talks about. And  
4 that's why there has to be a discharge or discipline. In  
5 fact, there's been some source of controversy, I think, at  
6 the Sixth Circuit because some judges sort of say, well --  
7 I'm not sure I personally agree, but that's what the law is,  
8 there's got to be a discharge or discipline for religious  
9 failure to accommodate. And that's -- like I said, the *Reed*  
10 case says it most clearly.

11           THE COURT: I imagine if one was to shepardize or  
12 I guess key site *Reed*, one would be able to find that progeny  
13 of cases where the judges, perhaps begrudgingly, followed  
14 *Reed*?

15           MR. FOX: Yes, other panels of the Sixth Circuit,  
16 as I recall. I'm asking my colleague to help me with that.

17           Yeah, and there's a dispute also ongoing at the  
18 Sixth Circuit about level of hardship, whether de minimis or  
19 not. I know we're not there yet, but . . .

20           THE COURT: Right. But isn't the discharge or  
21 discipline just putting a finer point on the concept of an  
22 adverse employment action?

23           MR. FOX: Well, it's not a -- certainly not a  
24 post-*Burlington Northern* retaliation type of standard. It's  
25 not just any adverse employment action that might fall under

1 retaliation context. Instead, the courts have used the  
2 phrase "discharge or discipline" to delineate how religious  
3 accommodation cases are different. I mean, we don't -- like  
4 I said before, it's like mixing apples and oranges. We don't  
5 want to get, you know, a medical or ADA issue using the same  
6 standard as a religious issue.

7 THE COURT: All right, so let me make sure I -- so  
8 the issue with this instruction is element 3, and then you've  
9 got an issue with the de minimis -- what we tried to do there  
10 was quote from -- was that the statute, Eileen? Yeah, the  
11 definition of religion -- I tried to avoid the term  
12 de minimis just because we then would have to explain it to  
13 the jury, and I felt like that having that last paragraph  
14 under Religious Accommodation explain that Metro has the  
15 burden of proving that it was unable to allow her to do that  
16 without undue hardship to operations, which I think is taken  
17 right out of the definition of religion, and not get into  
18 "without a more than de minimis impact," and then you got to  
19 define "de minimis," and just kind of cut straight to what  
20 the issue is, which is undue hardship.

21 MR. FOX: I object to that, Your Honor. I think  
22 the law right now in Sixth Circuit is pretty clear that it's  
23 got to be something more than de minimis. That phrase is  
24 used repeatedly, and it's why we offered a definition of  
25 de minimis, because the case law talks about even hardship

1 upon co-workers or having to have them take on  
2 responsibilities is considered more than de minimis hardship.  
3 I'm afraid this is going to leave the jury to conclude that  
4 undue hardship is placing something hefty upon the employer  
5 when it's not.

6 THE COURT: All right. Ms. Collins, your thoughts  
7 on that objection on the last sentence of the Religious  
8 Accommodation instruction?

9 MS. COLLINS: I mean, I think that the Supreme  
10 Court in *Trans World Airlines* said that de minimis -- it said  
11 de minimis cost. And so if you got into what de minimis  
12 means, you would have to put de minimis cost. And then you  
13 could go down a rabbit hole for all the converging cases that  
14 got into that. I know it's one of the most controversial  
15 areas right now. I was actually surprised the Supreme Court  
16 didn't accept cert on it last year when it had two cases  
17 before it that dealt with the issue, but I think that it  
18 would be problematic if you -- if you said "de minimis  
19 hardship," and you didn't say "de minimis cost," then -- I  
20 mean, you're just opening up the door to a world of  
21 confusion. So -- I see where just undue hardship is the  
22 safer route to go because that's what the statute says.

23 MR. FOX: I'm okay with saying "de minimis cost"  
24 so long as I get to argue before the jury that that's the law  
25 of the Sixth Circuit, is that it has to be something more

1    than -- I mean, even de minimis cost means that we don't have  
2    to accommodate the request. And that the burden upon  
3    co-workers is more than de minimis.

4               MS. COLLINS: Well, and that's been the criticism  
5    about that terminology, is that it goes outside what the  
6    statute says.

7               MR. FOX: I agree, but -- I mean, we could debate  
8    this, but cert denied means that's the law in Sixth Circuit.

9               THE COURT: You guys should be on a CLE panel and  
10   hash this out. All right, I'm going to take a further look  
11   at that too. We're obviously not going to get all of our  
12   instructions done today, but let's see what else we can get  
13   done.

14              So right now for -- I'm looking at the entire  
15   instruction as to religious discrimination, whether it goes  
16   in or not. We left some blanks there because we were trying  
17   to fashion a description, and I was hoping that perhaps the  
18   two of you-all could get together and figure out what to fill  
19   in that blank. Maybe that's a little too optimistic. But in  
20   the event that we give the instruction on religious  
21   discrimination -- the objection has been raised that it  
22   should not be given at all, and as I said, I'm going to look  
23   at that, and I may take it out. But if we did give it, what  
24   are the objections to the one that's currently drafted?

25              Let's start with the plaintiff. We got to fill in

1 those two blanks, but . . .

2 MR. FOX: Yes, Your Honor, we haven't had any  
3 language proposed from the plaintiff.

4 THE COURT: Okay. Do you have any language that  
5 you think is an appropriate succinct description of -- to  
6 complete the sentence was a motivating factor in Metro's  
7 decision blank -- to deny her leave? To -- we started  
8 tinkering with it, and then thought let's let you-all take a  
9 shot at it.

10 MR. FOX: Your Honor, while she's going to address  
11 that, can I address something on the same charge -- on the  
12 same heading?

13 THE COURT: Yes.

14 MR. FOX: Even if religious discrimination was  
15 going to be in the charge, it would also need to break out  
16 the elements that member of protected class, qualified for  
17 position, adverse employment action, similarly situated  
18 co-workers outside the protected class were treated more  
19 favorably, and then a definition of what legitimate  
20 nondiscriminatory reason is, and the definition of what a  
21 pretext is.

22 THE COURT: Well, in other words, what you're  
23 saying is if we give it, we have to basically go back --  
24 according to Metro, go back to the drawing board on this  
25 instruction?



1           MR. FOX: Yes, I mean, a full just boilerplate  
2 language about what a disparate treatment discrimination  
3 claim entails, and that should be put to the jury.

4           THE COURT: And the elements and so forth.

5           MR. FOX: Yes.

6           THE COURT: Okay. Did you come up with anything  
7 to fill in that blank?

8           MS. COLLINS: In Metro's decision to require a  
9 transfer -- to require her to transfer.

10          MR. FOX: I'm sorry. I didn't realize it was my  
11 turn. There's just no proof that was put on that we required  
12 her to transfer, other than her own subjective belief that  
13 she felt that need. There's no -- it's just not what the  
14 case is about.

15          THE COURT: I was kind of hoping for a fairly  
16 neutral description of the decision.

17          MS. COLLINS: Well, then it would just be a factor  
18 in Metro's decision, period.

19          THE COURT: Well, we thought about that, but  
20 then -- I mean, that's what we had, and then we thought,  
21 well, we'll give them a chance to put a little more meat on  
22 the bone, but I'm fine if we just put decision. You can  
23 argue in your closing what you think the proof shows the  
24 decision is and why it matters.

25          MS. COLLINS: Yeah.

1 THE COURT: What do you think about that?

2 MR. FOX: Absolutely not, Your Honor. We object  
3 to that. I think the fact that they can't fill in this blank  
4 is very telling. Essentially what it is, it's overlapping  
5 with the failure to accommodate with a -- I think the  
6 instinct is to fill in there something about the decision to  
7 deny the request, but we all know that that's overlapping of  
8 the failure to accommodate claim, it's the same thing because  
9 we already have that discrimination charge. That is  
10 discrimination. That is a charge that's already there. So  
11 that's just very telling that this Religious Discrimination  
12 under subtitle A is just not a separate discrete act. So we  
13 object to that.

14 THE COURT: Okay. All right. So we'll leave that  
15 one alone then. I was hoping we might make progress there.  
16 So on the Religious -- I'm sorry, the Religious Accommodation  
17 charge, we've got one agreed upon change to the second  
18 element. The third one I'm looking at because the objection  
19 by Metro is that it has to say either disciplined or --  
20 discharged or disciplined under Sixth Circuit authority and  
21 the request from Metro to flesh out de minimis more  
22 consistent with how the Sixth Circuit has interpreted the  
23 statute.

24 MR. FOX: Yes. And, Your Honor, Metro filed a set  
25 of proposed jury instructions --

1 THE COURT: Right.

2 MR. FOX: -- where we set forth some proposed  
3 definitions. And even if Your Honor wants to not use that,  
4 at least the authority -- we've cited the authority at the  
5 bottom of each one of those.

6 THE COURT: Right.

7 MR. FOX: Okay.

8 THE COURT: All right, this is probably a pipe  
9 dream, but how does the Retaliation charge look?

10 MS. COLLINS: I don't know that we need the first  
11 element. I think it's subsumed in the second and third and  
12 fourth. So that should be one, two, three elements, not  
13 four, but -- and I think that there should be just a little  
14 bit more explanation as to what "but-for" means consistent  
15 with *Bostock versus Clayton county*.

16 THE COURT: And your objections -- any to the  
17 Retaliation charge?

18 MR. FOX: Your Honor, we're actually pretty close  
19 on it. I want to reiterate -- and maybe this ship has  
20 sailed, but I want to reiterate our objection to No. 1. I  
21 haven't had a chance to look at the case law yet that you  
22 have cited earlier around lunchtime about that request for  
23 religious accommodation, in and of itself, is protected  
24 activity that you could sue on later for retaliation, but  
25 I --

1           THE COURT: I don't know if I would quite put it  
2 that way, but that it is, itself, protected activity, I think  
3 is what --

4           MR. FOX: I had understood the case law, when I  
5 read it, that it could be true if it was coupled with kind of  
6 in your face opposition to employer about a policy of the  
7 employer, you know, direct opposition. That's my  
8 understanding, but I would -- I need -- maybe perhaps  
9 overnight I can take a look at this, and I could come back  
10 around if that case law -- if we agree with it, then it may  
11 be that we could agree to that wording, but everything else  
12 is fine. I do agree with opposing counsel that maybe there  
13 should be a definition of "but-for" causation.

14           THE COURT: What are your thoughts on her  
15 suggestion that we can merge the first and second elements?

16           MR. FOX: We object to that, Your Honor, because  
17 we feel like, until I look at this case law and know for sure  
18 and form an opinion on it, that No. 1 should be opposition to  
19 a policy or procedure of the government that you feel as  
20 though is violative of Title VII. I always felt like that  
21 should be element 1. And then No. 2, Metro was aware that  
22 the opposition had been made, then et cetera, et cetera.  
23 But, like I said, I just need to study it. If I could have  
24 overnight, maybe we could come in first thing in the morning,  
25 I could agree to that and waive my objection.

1           THE COURT: Unfortunately, I think the earliest I  
2 can start is maybe 9, 9:15. But we will take a look at maybe  
3 fleshing out a little bit more on the "but-for." It seems  
4 like you-all agree that more there could be helpful to the  
5 jury.

6           MS. COLLINS: Yes. And we proposed some language  
7 in our set of jury instructions that was taken from *Bostock*.

8           THE COURT: We'll look at that. All right. So we  
9 didn't make a whole lot of progress on our three substantive  
10 instructions. Are there any objections to the Compensatory  
11 Damages instruction from the plaintiff?

12          MS. COLLINS: No. These are the same ones you've  
13 used before; right?

14          THE COURT: I believe so, yeah.

15          MS. COLLINS: Okay.

16          THE COURT: And what about from Metro?

17          MR. FOX: No, Your Honor.

18          THE COURT: And the Back Pay, we're basically just  
19 telling them don't concern yourself with that, but I  
20 understand that plaintiff needs to put on their proof for  
21 that. So if we get to that, then we'll deal with that  
22 separately. We're just instructing the jury not to concern  
23 themselves with it.

24                 And then the General Rules after that, any  
25 objections to those, typos, requested changes, so forth?

1 MS. COLLINS: No.

2 THE COURT: It's pretty boilerplate stuff.

3 MR. FOX: From the defense, no, Your Honor.

4 THE COURT: All right. Well, we're kind of back  
5 where we started an hour ago, which is what are we going to  
6 do with our three substantive instructions. I'm going to  
7 take a look at it, in particular, just so that you know what  
8 we're going to be taking a look at:

9 One is whether the instruction should be given at  
10 all on the Religious Discrimination claim for all the reasons  
11 both sides have stated. I won't go back through those. Then  
12 there are some issues with the wording of the reasonable --  
13 or the Religious Accommodation claim, particularly that  
14 element, that final element, and then more on the de minimis.  
15 And then Metro wants to take a look at some of the issues on  
16 retaliation, whether those elements are correctly stated.  
17 And then there's the "but-for" fleshing out, that we'll look  
18 at your instruction and try to figure out a way to  
19 incorporate that into the instructions.

20 So I think those are the four or five pins that  
21 we've left in this thing to come back to. Let's try to shoot  
22 for -- we're going to have to keep our jury waiting a little  
23 bit tomorrow. I can just -- I know that's going to happen.  
24 I'm going to try to be succinct and clear on where I come  
25 down on the first claim, because I need to look back at the

1 complaint, the pretrial order, the summary judgment briefing,  
2 all that. But as far as the other two claims -- and then  
3 what instruction you would want should it go to the jury, we  
4 hadn't even really unpacked that one yet. And then we'll  
5 look at the other two instructions.

6           And try to be as prepared with exactly what you  
7 want when we start in the morning as you can be so that we  
8 can make some progress. And then when we're ready for the  
9 jury, we'll be ready for them, but not until we are, not  
10 until we get this instruction done.

11           Yes, sir?

12           MR. FOX: And, Your Honor, at some point I need to  
13 renew my Rule 50 motion before the case is sent to the jury.

14           THE COURT: Right.

15           MR. FOX: I don't want to belabor all the points.  
16 Would I be able to do that first thing tomorrow morning?

17           THE COURT: Sure, you can.

18           MR. FOX: Okay.

19           THE COURT: I mean, if you want to say a whole lot  
20 more than "For the same reasons that I stated earlier," you  
21 can flesh that out. That may bog us down a little bit if you  
22 raise some new issues, but it's your right to make the  
23 motion. I'm already seven minutes late for a meeting that  
24 I'm supposed to be in. So we will just add that to the pins  
25 we've put in things this afternoon.

1 MR. FOX: We appreciate your time, Your Honor.

2 MS. COLLINS: Your Honor, can I bring up one thing  
3 because I know -- on the verdict form, it just leaves off a  
4 line for back pay. It just has compensatory damages.

5 THE COURT: Right, because I just have an  
6 instruction in here that says the judge -- if they find for  
7 liability, then the judge will award back pay. That was the  
8 instruction we just looked at.

9 MS. COLLINS: What now? It had two different --  
10 it had Back Pay and Compensatory.

11 THE COURT: And Back Pay said "You don't need to  
12 worry about this, Jury. You don't need to concern yourself  
13 with it." There's proof in the record for back pay, but the  
14 jury is not asked to award the back pay piece of compensatory  
15 damages I think under controlling authority. We may have  
16 done it differently before, but I've been converted, I guess.

17 MS. COLLINS: I didn't really get that.

18 THE COURT: We'll have to pull the case because  
19 we've been looking at this other stuff. I don't have it  
20 committed to memory, but in a pretty recent employment  
21 case -- and the lawyers agreed, that back pay would be  
22 awarded -- the amount of back pay would be decided by the  
23 Court as a remedy and not as -- if they find liability on  
24 whatever theories they're presented with, then, of course,  
25 you're going to be able to argue for back pay. And then



1 that's up to me to decide the back pay amount.

2 MS. COLLINS: I see what you're saying.

3 THE COURT: And I think we had that issue come up  
4 in that other case, didn't we?

5 MR. FOX: Yes.

6 THE COURT: Where they awarded it, and that was  
7 wrong.

8 MR. FOX: They awarded zero.

9 THE COURT: Oh, they awarded zero, and we probably  
10 shouldn't have even given it to them. Is that my memory --

11 MR. FOX: Yeah. And we probably shouldn't discuss  
12 it, Your Honor, without opposing counsel here because it's --

13 THE COURT: That's true.

14 MR. FOX: -- it's an ongoing case.

15 THE COURT: That's a fair point. That's a fair  
16 point. I'm just trying to remember the sequence of events.

17 MR. FOX: Right.

18 MS. COLLINS: No, I know what you're talking  
19 about. You're talking about the statutory language of  
20 Title VII.

21 THE COURT: Perhaps. I just know that we had a  
22 case last time that both lawyers agreed said the jury can  
23 decide the liability, and if they find liability, then the  
24 judge then steps in and does back pay.

25 MS. COLLINS: Okay.

1           THE COURT: And if it was done differently in  
2 other cases, then it was done differently, but -- any other  
3 concerns from the plaintiff on the verdict form?

4           MS. COLLINS: No, Your Honor.

5           THE COURT: What about from the defendant?

6           MR. FOX: No, Your Honor.

7           THE COURT: All right, we got at least something  
8 in the can. Just take a look at it in the morning. If you  
9 discover something with the verdict form that's problematic,  
10 I'll hear you out, but --

11          MR. FOX: It would just be the elimination of the  
12 discrimination --

13          THE COURT: Oh, sure. If I don't charge them on  
14 that count, I'm not going to give them a question to answer.

15          MR. FOX: Right.

16          THE COURT: All right, everybody have a good  
17 evening.

18

19               (Proceedings adjourned at 4:10 p.m.)

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1                                    REPORTER'S CERTIFICATE

2                    I, Patricia A. Jennings, Official Court Reporter  
3 for the United States District Court for the Middle District  
4 of Tennessee, with offices at Nashville, do hereby certify:

5                    That I reported on the Stenograph machine the  
6 proceedings held in open court on November 9, 2022, in the  
7 matter of CAROL BARTON vs. METROPOLITAN GOVERNMENT OF  
8 NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,  
9 Case No. 3:20-cv-00118; that said proceedings in connection  
10 with the hearing were reduced to typewritten form by me; and  
11 that the foregoing transcript (pages 1 through 154) is a true  
12 and accurate record of said proceedings.

13                    This the 3rd day of January, 2023.  
14  
15  
16  
17

18                                    /s/ Patricia A. Jennings  
19                                    Patricia A. Jennings, RMR, CRR  
20                                    Official Court Reporter  
21  
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25